93-406

Supreme Court, U.S.
FILED
SEP 10 1993
OFFICE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS,
GRANT WOODS, ARIZONA Attorney General,

PETITIONERS,

-vs-

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

RESPONDENT,

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, JIMMY ALAN ARNETT,

REAL PARTIES IN INTEREST.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section
(Counsel of Record)
1275 West Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686

Attorneys for PETITIONERS

QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit abuse its discretion by refusing to issue a writ of mandamus to supervise the orderly administration of the Arizona District Court, when the evidence clearly demonstrated that the District Court had shown a constant refusal to rule promptly on pending capital habeas corpus cases?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS WHY THE WRIT SHOULD ISSUE	9
CONCLUSION	19
APPENDIX A	A-1
APPENDIX B	B-1

TABLE OF AUTHORITIES

CASE — PAGE

Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) 5

Allied Chemical Corp. v. Daiflon, Inc.,
449 U.S. 33, 101 S. Ct. 188, 66 L. Ed. 2d 193 (1980) 10

Blazak v. Ricketts, 971 F.2d 1408 (9th Cir. 1992) 15

Chandler v. Judicial Council of the Tenth Circuit,
398 U.S. 74, 90 S. Ct. 1648, 26 L. Ed. 2d 100 (1970) 16

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 5 L. Ed. 257 (1821) . 13

Ex Parte Newman,
81 U.S. (14 Wall.) 152, 20 L. Ed. 877 (1872) 9, 12

In re Blodgett,
___ U.S. ___, 112 S. Ct. 674,
116 L. Ed. 2d 669 (1992) . . . . . Passim

Insurance Company v. Comstock,
83 U.S. (16 Wall.) 258, 21 L. Ed. 493 (1873) 9, 11, 12

Johnson v. Rogers, 917 F.2d 1283 (10th Cir. 1990) 10, 14

Jones v. Shell, 572 F.2d 1278 (8th Cir. 1978) 14

Keeney v. Tamayo-Reyes,
___ U.S. ___, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992) . . 6

La Buy v. Howes Leather Company,
352 U.S 249, 77 S. Ct. 553,
1 L. Ed. 2d 560 (1957). 10, 14, 16

Lockett v. Ohio,
438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) 7

Mallard v. United States Dist. Court for the S. Dist. of Iowa,
490 U.S. 296, 109 S. Ct. 1814,
104 L. Ed. 2d 318 (1989) 10, 13
McClellan v. Young, 421 F.2d 690 (6th Cir. 1970) 10, 14
McCleskey v. Zant,
___ U.S. ___, 111 S. Ct. 1454,
113 L. Ed. 2d 517 (1991) 12, 13
Roche v. Evaporated Milk Ass'n,
319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185 (1943) 9, 14
State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978) 7
State v. Arnett, 125 Ariz. 201, 608 P.2d 778 (1980) 7
State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988) 8
Thermtron Prods., Inc. v. Hermansdorfer,
423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976) . . . 9, 10
Van Buskirk v. Wilkinson, 216 F.2d 735 (9th Cir. 1954) 10
Walton v. Arizona,
497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) . . 15
Will v. Calvert Fire Insurance Company,
437 U.S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978) . . 9, 11
Will v. United States,
389 U.S. 90, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967) . . . 15, 16

CONSTITUTIONAL PROVISIONS

United States Constitution, Article III, Section 2 2

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1651(a) 2, 3, 9

RULES

Rule 10.1, Rules of Supreme Court 2

OTHER AUTHORITIES

Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,

76 Harv. L. Rev. 441 (1963) 13

9 MOORE'S FEDERAL PRACTICE

¶ 110.28 at 341–42 (2d ed. 1993) 14, 15

WRIGHT, MILLER, COOPER & GRESSMON, FEDERAL PRACTICE AND PROCEDURE,

§ 3933 at 214 (1977) 14

OPINIONS BELOW

On July 1, 1993, the State of Arizona filed a petition for Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit. (Appendix A.) On July 21, 1993, a three-judge panel of that court summarily denied Arizona's petition without comment and without ordering the respondent court to respond. (Appendix B.)

STATEMENT OF JURISDICTION

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Arizona Attorney General, on behalf of Petitioners, prays that a Writ of Certiorari issue to review the decision of the Ninth Circuit Court of Appeals in refusing to exercise its supervisorial control of the United States District Court for the District of Arizona. The Ninth Circuit entered its order denying the mandamus petition on July 21, 1993. (Appendix B.) This petition is timely filed within 90 days of that order. Petitioners invoke this Court's Jurisdiction under United States Constitution Article III, Section 2, 28 U.S.C. § 1254(1), 28 U.S.C. § 1651(a), and Supreme Court Rule 10.1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651(a).

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

On July 1, 1993, Arizona filed a petition for Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit. (Appendix A.) In the petition, Arizona presented five capital habeas corpus cases in which the District Court had refused to promptly rule. The specific procedural history of each case is noted below.[1] The State also attached a chart of all of its pending capital habeas corpus cases. In 56% of the pending cases, the petition was filed in the District Court more than 5 years ago, and of those cases nearly half were filed before 1986. (See Appendix A at A-33-34.)

The State requested that the appellate court exercise its supervisory authority over the District Court and order the lower court to rule on the pending capital cases within specific time periods. (*Id.* at A-26-27.) On July 21, 1993, without ordering the District Court to respond to the petition, a three-judge panel of the Ninth Circuit issued an order denying the mandamus petition without comment on the merits. (Appendix B.) The State timely petitions for certiorari from the action of the Ninth Circuit.

Correll v. Lewis.

Michael Emerson Correll is an inmate in the Arizona State Prison sentenced to be executed. On September 15, 1987, Correll filed a Petition for Writ of Habeas Corpus and an Application for Stay of Execution. On September 18, 1987, the District Court of Arizona issued an order staying

---

1. In two of the cases, *Chaney* and *Ceja*, the State challenged the fact that the District Court had not ruled on procedural motions that had been pending for over a year. After the State filed the mandamus petition the District Court ruled on those motions, therefore those cases are not specifically presented in this petition.

the scheduled execution. On October 2, 1987, the District Court appointed two attorneys to represent Correll in the habeas corpus proceeding. Later the court granted Correll's request to amend the petition. On February 24, 1988, Correll filed his first Amended Petition for Writ of Habeas Corpus.

On September 7, 1989, the State filed two separate motions for summary judgment.[2] On November 15, 1989, Correll filed a response to the State's Motions for Summary Judgment, and the State replied on December 4, 1989. On February 10, 1990, Correll filed another motion to amend the petition raising two additional claims. Over the State's opposition, on March 14, 1990, the District Court granted Correll's request to amend. On April 2, 1990, the State filed a summary judgment motion on the newly added claims. The District Court took no action on the State's summary judgment motions.

In 1991, when the District Court learned that the State was preparing a mandamus petition against the court for failing to act on the summary judgment motions, the court ordered a status conference on the petition. On October 4, 1991, more than 4 years after the filing of Correll's petition, the District Court vacated the State's summary judgment motions, and allowed Correll to amend his petition one more time.

On December 6, 1991, Correll filed his Third Amended Petition for Writ of Habeas Corpus. On February 14, 1992, the State again filed a

---

2. The delay in the filing of a response to Correll's amended petition was initially due to oversight in the District Court Clerk's Office in that it failed to serve the State with copies of any of the District Court's orders. Also, after the Ninth Circuit issued its opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), holding Arizona's death penalty statutes to be unconstitutional, the District Court stayed all proceedings related to Correll's death sentence, but ordered the proceedings related to the remainder of the claims to continue.

Motion for Summary Judgment. On May 15, 1992, Correll filed a response to the State's summary judgment motion, and the State replied on May 29, 1992. In conjunction with his response to the motion for summary judgment, Correll moved to expand the record with material never presented to the state courts. The State objected to the motion, and on June 19, 1992, the District Court heard argument on the respective motions and stated, "The court will enter a formal written order in this matter."

After waiting over 9 months for the Court's written order, the State filed a request for ruling. The State pointed out the extreme length of time —5½ years—that had passed since Correll filed his original petition with the court. The State asked, pursuant to *In re Blodgett*, ___ U.S. ___, 112 S. Ct. 674 (1992), that the court "exercise all due diligence and render its opinion forthwith." The District Court did not respond to the State's request for ruling, nor did it rule on the State's Motion for Summary Judgment, so the mandamus petition was filed.[3]

Villafuerte v. Lewis.

Jose Roberto Villafuerte is an inmate in the Arizona State Prison sentenced to be executed. On May 9, 1991, Villafuerte filed a preliminary Petition for Writ of Habeas Corpus and an Application for Stay of

---

3. After the State filed the mandamus petition, the District Court issued an order denying Correll's motion to supplement the record in accordance with *Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S. Ct. 1715 (1992). The court also found that 26 of the claims raised by Correll were in procedural default. However, the court ordered that Correll could file additional pleadings to show cause and prejudice for the default. The Court then vacated the submission of the State's summary judgment motion. The State objected to the District Court vacating the submission of its motion.

Execution in the District Court. On May 14, 1991, the District Court issued a stay of the execution and appointed counsel for Villafuerte. On July 19, 1991, Villafuerte filed an amended petition. On August 26, 1991, the State filed a motion for summary judgment on all issues in the amended petition. Villafuerte filed a response and the State filed a reply. On March 16, 1992, the District Court heard oral argument on the motion for summary judgment. As of the date the State filed its mandamus petition, the District Court had not ruled on the motion for summary judgment, although more than 15 months had passed since oral argument on the motion.[4]

Arnett v. Lewis.

The Arizona Supreme Court first affirmed Arnett's conviction and death sentence in *State v. Arnett,* 119 Ariz. 38, 579 P.2d 542 (1978). Arnett was resentenced after this Court's opinion in *Lockett v. Ohio,* 438 U.S. 586 (1978), and that sentence was affirmed in *State v. Arnett*, 125 Ariz. 201, 608 P.2d 778 (1980). Arnett filed his federal habeas corpus petition in 1983. Arnett had failed to exhaust some of the issues he raised, so while his petition was pending he returned to state court. Arnett filed partial summary judgment motions and, in February 1987, the District Court ruled on those motions. The court granted partial relief to Arnett to include another resentencing, and an evidentiary hearing on the

---

4. After the State filed its mandamus petition with the Ninth Circuit, the District Court took some action on the *Villafuerte* case. In an order dated July 9, 1993, the court denied Villafuerte's motion to reconsider the court's order finding procedural default on six claims and refusing to hold an evidentiary hearing. As of the date of the filing of this certiorari petition, the District Court had taken no further action on the State's summary judgment motion.

voluntariness of his confession.

On March 6, 1987, the State sought a stay from the District Court because the Arizona Supreme Court had decided to hear Arnett's new state claims on the merits. The District Court granted the stay. In 1988, the Arizona Supreme Court again affirmed the conviction and death sentence in *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988). The State asked the District Court to lift the stay and grant a rehearing. Arnett then asked to amend his petition to include the new issues recently decided by the Arizona Supreme Court. The District Court lifted the stay but denied the State's motion for rehearing. The District Court allowed Arnett to amend his petition.

For 2 years, discovery took place in anticipation of the federal evidentiary hearing on the voluntariness issue. The parties filed memoranda on the admissibility of evidence. In April 1992, Arnett filed a fourth motion for partial summary judgment on his amended petition. The State filed its response on May 13, 1992. The District Court has not ruled on Arnett's motion, nor has it set a date for the evidentiary hearing.

REASONS WHY THE WRIT SHOULD ISSUE

BECAUSE THE DISTRICT COURT HAS GRANTED STAYS OF EXECUTION IN THESE CAPITAL CASES, IT HAS A DUTY TO TAKE ALL STEPS NECESSARY TO ENSURE THE PROMPT RESOLUTION OF THE CASE—A DUTY THE DISTRICT COURT OF ARIZONA HAS FAILED TO FULFILL; THEREFORE, THE NINTH CIRCUIT CLEARLY ABUSED ITS DISCRETION BY SUMMARILY DENYING THE STATE'S MANDAMUS PETITION.

A. THE DISTRICT COURT'S FAILURE TO RULE PROMPTLY ON THE ISSUES BEFORE IT IS BEING OFT REPEATED, MANDATING THAT THIS COURT ACCEPT THE PETITION AND SUPERVISE THE ORDERLY ADMINISTRATION OF THE FEDERAL DISTRICT COURT OF ARIZONA.

Under the All Writs Act, 28 U.S.C. § 1651(a), the federal courts of appeals may issue a wit of mandamus when it is "necessary or appropriate in aid of their respective jurisdictions." *Will v. Calvert Fire Insurance Company*, 437 U.S. 655, 661 (1978) (plurality opinion); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943). This Court has long recognized this authority, and stated when it should be used.

> Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refused to hear and decide the controversy, or where such a court, having heard the cause, ***refuses to render judgment or enter a decree in the case.***

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872) (emphasis added). Repeated decisions of this Court have established the rule that mandamus "will lie in a proper case to direct a subordinate Federal Court to decide a pending cause." *Insurance Company v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1873); *Will v. Calvert Fire Ins. Co.*, 437 U.S. at 662; *Thermtron*

Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352 (1976).

For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of the respondent to do the action in question, and no other adequate remedy available. The petitioner must also show that the right to the writ is "clear and indisputable." *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 109 S. Ct. 1814, 1822 (1989); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35-36 (1980). Arizona believes that it demonstrated each criterion established by this Court and that it was plain and manifest error for the Ninth Circuit to deny the mandamus petition, thereby warranting relief in this Court. *La Buy v. Howes Leather Company*, 352 U.S. 249, 259-60 (1957) (writs on mandamus may be used for "supervisory control of the District Courts by the Court of Appeals").

1. The District Court has a plainly defined and peremptory duty to act promptly in capital habeas corpus cases—a duty the District Court of Arizona constantly fails to fulfill.

There is general agreement among the Circuit Courts that "[h]abeas corpus is a speedy remedy entitled to preferential consideration." *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970); *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990); *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737-38 (9th Cir. 1954). Recently, this Court stated that it would not tolerate unreasonable delay in a capital habeas corpus case, and held that such delay could be the basis of a mandamus petition:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty ***to take all steps necessary to ensure a prompt resolution of the matter***, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, __ U.S. __, 112 S. Ct. 674, 676 (1992) (emphasis added).

The District Court of Arizona, by not promptly resolving the matters before it, has failed in the instant cases to follow the dictates of *In re Blodgett*. In *Correll*, the petition for writ of habeas corpus has been pending in the District Court since September 15, 1987. The petition has been under various motions for summary judgment since December 4, 1989. The most recent motion for summary judgment was at issue on June 19, 1992. After the State's mandamus petition was filed in the Ninth Circuit, the District Court allowed Correll to file additional pleadings, and vacated the submission of the motion. (See footnote 3 *supra*.) In *Villafuerte*, the petition for writ of habeas corpus was filed May 9, 1991. That petition was submitted under a motion for summary judgment since March 16, 1992. Arnett filed his petition for writ of habeas corpus in 1983. The District Court has granted Arnett a new sentencing hearing and ordered an evidentiary hearing on one of his issues concerning his conviction. The order granting an evidentiary hearing is more than 2 years old, and the District Court has yet to set a date for the hearing.

The District Court has failed in its "duty ***to take all steps necessary to ensure a prompt resolution of the matter.***" *Blodgett*, 112 S. Ct. at 676 (emphasis added).

2. Mandamus is the only available means to ensure the prompt resolution of the instant cases.

A petition for writ of mandamus to a higher court is the appropriate action when an inferior court refuses to act on a case pending before it.

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins., 437 U.S. at 661-62 (quoting *Insurance Company*

v. Comstock, 83 U.S. (16 Wall.) 258, 270 (1872)); *Ex Parte Newman*, 81 U.S. (14 Wall.) at 165. The State of Arizona has no other available remedy to ensure a prompt resolution of these cases except a mandamus petition.

3. The prejudice suffered by the State through the dilatory actions of the District Court are real and should be addressed through a mandamus petition.

This Court recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas corpus petition.

> None of the reasons offered in the response dispels our concern that the State of Washington has sustained ***severe*** prejudice by the ***two-and-a-half*** year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [*McCleskey v. Zant*] when discussing the importance of finality in the context of federal habeas corpus proceedings.

In re Blodgett, 112 S. Ct. at 676 (citation omitted, emphasis added). As with the State of Washington in *Blodgett*, Arizona is suffering a severe diminution of its sovereign power.

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but ***the power of a state to pass laws means little if the state cannot enforce them***.

McCleskey v. Zant, __ U.S. __, 111 S. Ct. 1454, 1469 (1991) (emphasis added). The diminution of sovereignty is even greater for the State of Arizona in these cases because the federal courts have prevented the State from enforcing its criminal laws against some of these inmates for considerably longer than the "two-and-a-half" years condemned by the Court in *Blodgett*.

The District Court's apparent endless search for epistemological certainty on the issues before issuing a decision damages the very justice the court seeks.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 111 S. Ct. at 1469 (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452–53 (1963)). A court immobilized in its search for justice provides none. The District Court's duty is not to achieve absolute certainty on an issue before it, but simply, after due consideration, to decide it.

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. ***We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.***

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (emphasis added). Ever-delayed justice is no justice at all.

The State of Arizona has a clear right to a writ of mandamus because the District Court has a plainly defined and peremptory duty to act in a prompt fashion, and the District Court has failed to perform that duty. The State continues to suffer prejudice because of the District Court's failure to act. Therefore, the State's right to the writ is "clear and indisputable." *Mallard*, 109 S. Ct. at 1822. The Ninth Circuit abused its discretion by

not ordering the District Court to respond,[5] and thereafter granting the writ. WRIGHT, MILLER, COOPER & GRESSMON, FEDERAL PRACTICE AND PROCEDURE § 3933 at 214 (1977) (Court of Appeals lacks discretion to deny writ control of patently improper district court actions).

B. THE NINTH CIRCUIT'S FAILURE TO EXERCISE ITS SUPERVISORIAL CONTROL OVER THE DISTRICT COURT PERPETUATES THE PREJUDICE SUFFERED BY THE STATE AND CONDONES THE DISTRICT COURT'S IMPROPER BEHAVIOR.

In *La Buy*, this Court noted that "supervisory control of the District Court by the Courts of Appeals is necessary to proper judicial administration in the federal system." 352 U.S. at 259–60. Even prior to *La Buy*, however, this Court recognized the need to exercise control over the district courts when the courts demonstrated "persistent disregard" of the rules of this Court. *Roche v. Evaporated Milk Ass'n*, 319 U.S. at 31. Legal commentators note that the courts of appeals must exercise control over the district courts to ensure "that its district courts are in fact courts and not schools of solipsism." 9 MOORE'S FEDERAL PRACTICE ¶110.28

---

5. The District Court has not officially explained why it is taking so long to process capital habeas corpus cases. Informally, the court has indicated it is doing the best it can with its current case load. Such an excuse, however, is unacceptable, and has been repeatedly rejected as a matter of law. *Johnson v. Rogers*, 917 F.2d at 1285 ("[H]igh volume of prisoner cases pending in the District of Kansas is insufficient to justify the delay."); *McClellan v. Young*, 421 F.2d at 691 (excessive volume of pending habeas petitions insufficient ground to justify delay in deciding them); *see also Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (busy court docket cannot justify 14-month delay in processing claim from date of remand). If such an excuse were accepted, then the holding of *Blodgett* should be amended to read that the court has a duty to take all steps necessary to ensure a prompt resolution of the matter, *unless it is too busy*. This Court should reject the informal excuse offered by the District Court.

at 341–42 (2d ed. 1993).

In *Will v. United States*, 389 U.S. 90, 107 (1967), this Court criticized the circuit court for failing to explain its decision regarding the mandamus petition. The failure of the court of appeals to explain its action was found critical for two reasons. First, it deprived this Court of any effective information on the question whether the practice of the district courts within the circuit was such as to create a need for "mandamus as a corrective measure." Second, the lack of any opinion meant that the district courts and the parties would not receive any beneficial guidance or instruction concerning what was considered to be proper future conduct. Absent an explanatory opinion, action on a mandamus petition "without rationale is tantamount to an abdication of the . . . expository and supervisory functions of an appellate court." *Will v. United States*, 389 U.S. at 107.

The State demonstrated that the District Court had violated and was continuing to violate the duty recognized by this Court in *Blodgett*. Not only were the five selected cases abysmal in and of themselves, but in looking at the attached chart showing the cases pending in the District Court, it is clear that the District Court of Arizona does not handle capital habeas corpus petitions in an expeditious fashion. (Appendix A at A-33-34.) Besides *Blazak v.* Ricketts, 971 F.2d 1408 (9th Cir. 1992), remanded 1993 U.S. App. LEXIS 19682 (9th Cir. 1993), the District Court has not finally disposed of a first petition in any capital case pending in that court for over 3 years.[6] Yet, the Ninth Circuit without comment

---

6. The 3 years is of particular concern because that is how long it has been since this Court upheld Arizona's death penalty statute. *Walton v. Arizona*, 497 U.S. 639 (1990).

simply denied the State's petition. The action of the Ninth Circuit is an "abdication of the . . . expository and supervisory functions" of the court. *Will v. United States*, 389 U.S. at 107.

The rejection of the State's petition sends a clear signal to the District Court that the Ninth Circuit condones the lower court's present practice of taking up to 10 years to decide a capital habeas corpus petition. Without a reasoned opinion, the State is at a loss to know what was lacking in its petition. By denying the petition, was the Ninth Circuit really saying it is reasonable for a district court to wait for over a year to rule on a non-dispositive procedural motion in a capital case? Does the Ninth Circuit really believe that it is acceptable in the federal courts to have dispositive motions for summary judgment pending for literally years? When does the delay become unreasonable, and when should the state seek mandamus review? The action of the Ninth Circuit in not requiring a response and issuing a reasoned opinion is error warranting review by this Court. *Will v. United States*.

C. THIS COURT SHOULD EXERCISE ITS SUPERVISORIAL AUTHORITY AND ESTABLISH A 120-DAY TIME LIMIT FOR RULING ON DISPOSITIVE MOTIONS, A 30-DAY TIME LIMIT FOR RULING ON PROCEDURAL MOTIONS, AND A 180-DAY TIME LIMIT FOR SCHEDULING AN EVIDENTIARY HEARING.

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has abused its discretion. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85 (1970); *La Buy v. Howes Leather Co.*, 352 U.S. at 257. In *Blodgett*, this Court stated that the federal courts had a duty in capital cases to "***take all steps necessary to ensure a prompt resolution of the matter***." 112 S. Ct. at 676 (emphasis added). Clearly, the District Court of Arizona has failed to follow the *Blodgett* mandate.

That leaves this Court and the State of Arizona with two options. First, the State may petition for writ of mandamus in every current or future capital case pending in the District Court when the court fails to promptly rule on a motion. Such a scenario, however, would require constant inquiries by the appellate court in hundreds of cases, consuming valuable court and attorney time. Second, this Court may order the District Court to rule within specified times on motions in pending capital cases once the motions become at issue. The failure to rule within the time limit would be prima facia evidence that the court has not complied with the *Blodgett* mandate, subjecting the lower court to an order to show cause. This option would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case.

The State believes the second alternative is preferable to the first. The *Blodgett* mandate is clear—federal courts must establish procedures and practices to ensure "***prompt***" resolution of habeas corpus petitions in capital cases. The District Court of Arizona has failed to do so. Because the Ninth Circuit has failed to exercise its supervisorial function, this Court must exercise control and establish guidelines that the lower court must obey. Setting time limits for ruling on motions allows the lower court some flexibility, but assures the State that the District Court's current practice of allowing Arizona's capital cases to languish for 10 or more years before ruling will cease.

The State of Arizona believes that once a motion is at issue, it should not take the District Court more than 120 days to rule on a dispositive motion, and 30 days to rule on a procedural motion. The entire state court record is before the court, with record citations and state court opinions. The parties will have briefed the issues, citing the relevant cases. These

time limits provide ample time for the court to rule.

When the District Court determines that an evidentiary hearing is required, the State believes that the hearing should be set within 180 days. One hundred and eighty days is longer than the speedy trial provisions of both the state and federal courts. It is baffling to the State why an evidentiary hearing in a collateral proceeding should require more preparation time than the trial.

The District Court of Arizona has failed to promptly resolve these habeas corpus petitions, and it is incumbent that this Court ensure that its mandate in *In re Blodgett* is satisfied. Establishing these time limits for the District Court to rule on pending capital habeas corpus petitions is not only warranted, but absolutely necessary for the orderly administration of justice.

CONCLUSION

For all of the above-stated reasons, the State of Arizona respectfully requests that the Court grant its certiorari petition and order the respondent court to render its decision on the dispositive motions within 120 days. The State further requests that the District Court be ordered to hold the evidentiary hearing in *Arnett* within 180 days. Furthermore, the State prays that the Court exercise its supervisorial authority and order that the District Court rule on all future capital cases within the time limits established, or its failure will be deemed to be prima facie evidence that an order to show cause is warranted.

Respectfully submitted,
GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
(Counsel of Record)

Attorneys for PETITIONERS

APPENDICES

APPENDIX A

[Dated July 1, 1993]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. _____

SAMUEL L. LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS; GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

-vs-

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
RESPONDENT,

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, ANTHONY LEE CHANEY, JIMMY ALAN ARNETT, JOSE JESUS CEJA,
REAL PARTIES IN INTEREST.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NOS. CIV-87-1471-PHX-SMM, CIV-91-0729-PHX-SMM, CIV-85-2266PHX-RCB, CIV-83-2157-PHX-SMM, CIV-84-2322-PHX-RCB

PETITION FOR WRIT OF MANDAMUS

GRANT WOODS
ATTORNEY GENERAL

PAUL J. MCMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES II

STATEMENT OF THE FACTS 1

CORRELL, CIV-87-1471-PHX-SMM 1

VILLAFUERTE, CIV-91-0729-PHX-SMM 2

CHANEY, CIV-85-2266-PHX-RCB 3

ARNETT, CIV-83-2157-PHX-SMM 4

CEJA, CIV-84-2322-PHX-RCB 5

ISSUES PRESENTED 7

RELIEF REQUESTED 7

REASONS WHY THE WRIT SHOULD ISSUE

BECAUSE THE DISTRICT COURT HAS GRANTED STAYS OF EXECUTION IN THESE CAPITAL CASES, IT HAS A DUTY TO TAKE ALL STEPS NECESSARY TO ENSURE THE PROMPT RESOLUTION OF THE CASE; A DUTY THE DISTRICT COURT OF ARIZONA HAS FAILED TO FULFILL. 8

A. MANDAMUS IS THE ONLY AVAILABLE MEANS TO ENSURE THE PROMPT RESOLUTION OF THE INSTANT CASES. . . . 9

B. THE DISTRICT COURT'S FAILURE TO RULE PROMPTLY ON THE ISSUES BEFORE IT IS BEING OFT REPEATED, MANDATING THAT THIS COURT ACCEPT THE PETITION AND SUPERVISE THE ORDERLY ADMINISTRATION OF THE FEDERAL DISTRICT COURT OF ARIZONA. 11

C. THE STATE REQUESTS THAT THIS COURT EXERCISE ITS SUPERVISORIAL AUTHORITY AND ESTABLISH A 120-DAY TIME LIMIT FOR RULING ON DISPOSITIVE MOTIONS, A 30-DAY TIME LIMIT FOR RULING ON PROCEDURAL MOTIONS,

AND A 180-DAY TIME LIMIT FOR SCHEDULING AN EVIDENTIARY HEARING. 13

CONCLUSION 15

CERTIFICATE OF SERVICE 16

STATEMENT OF RELATED CASES 18

TABLE OF AUTHORITIES

CASES — PAGE

Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) 1, 3

Blazak v. Lewis, 971 F.2d 1408 (9th Cir. 1992) 12

Bauman v. United States District Court,
557 F.2d 650 (9th Cir. 1977) 9, 11

Chandler v. Judicial Council of the Tenth Circuit,
398 U.S. 74, 90 S. Ct. 1648, 26 L. Ed. 2d 100 (1970) 8

Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986) 3

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) 11

Ex Parte Newman, 81 U.S. (14 Wall.) 152 (1872) . . . 8, 10, 11

In re Blodgett,
___ U.S. ___, 112 S. Ct. 674,
116 L. Ed. 2d 669 (1992) 2, 8, 10, 12, 13, 14

In re Cement Antitrust Litigation (MDL NO. 296),
688 F.2d 1297 (9th Cir. 1982) 9, 11

Insurance Company v. Comstock,
83 U.S. (16 Wall.) 258 (1872) 10

La Buy v. Howes Leather Co.,
352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957) 8

Lewis v. Jeffers,
497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) . 7

McCleskey v. Zant,
___ U.S. ___, 111 S. Ct. 1454,
113 L. Ed. 2d 517 (1991) 7, 10, 11

Roche v. Evaporated Milk Ass'n,
319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185 (1943) 8
State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978) 4
State v. Arnett, 125 Ariz. 210, 608 P.2d 778 (1980) 4
State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988) 4
State v. Chaney, 141 Ariz. 295, 686 P.2d 1265 (1984) 3
Walton v. Arizona,
497 U.S. 639, 110 S. Ct. 3047,
111 L. Ed. 2d 511 (1990) 3, 7, 12
Will v. Calvert Fire Insurance Company,
437 U.S. 655, 98 S. Ct. 2552,
57 L. Ed. 2d 504 (1978) 8, 10

STATUTES

28 U.S.C. § 1651(a) 8

OTHER AUTHORITIES

Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) 11

STATEMENT OF THE FACTS

***Correll v. Lewis*, No. CIV-87-1471-PHX-SMM.**

Michael Emerson Correll is an inmate in the Arizona State Prison sentenced to be executed. On September 15, 1987, Correll filed a Petition for Writ of Habeas Corpus and an Application for Stay of Execution. (Exhibits A and B.) On September 18, 1987, the District Court of Arizona issued an order staying the scheduled execution of Correll. (Exhibit C.) On October 2, 1987, the District Court appointed two attorneys to represent Correll in the habeas corpus proceeding. (Exhibit D.) Later the court granted Correll's request to amend the petition. (Exhibit E.) On February 24, 1988, Correll filed an Amended Petition for Writ of Habeas Corpus. (Exhibit F.)

On April 10, 1989,[1] the State filed a motion to dismiss the amended petition because Correll had not exhausted state court remedies. (Exhibit H.) On June 5, 1989, the District Court denied the State's motion to dismiss, and ordered a response to the petition. (Exhibit I.) After this Court issued its opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), the District Court stayed all

---

1. The delay in the filing of a response to Correll's amended petition was due to oversight in the District Court Clerk's Office in that it failed to serve the State with copies of any of the District Court's orders. (Exhibit G.)

proceedings related to Correll's death sentence, but ordered the proceedings related to the remainder of the claims to continue. (Exhibit J.)

On September 7, 1989, the State filed two separate motions for summary judgment. (Exhibit K.) On November 15, 1989, Correll filed a response to the State's Motions for Summary Judgment, and the State replied on December 4, 1989. On February 10, 1990, Correll filed another motion to amend the petition raising two additional claims. (Exhibit L.) The State opposed Correll's request. (Exhibit M.) On March 14, 1990, the District Court granted Correll's request to amend the petition. (Exhibit N.) On April 2, 1990, the State filed a summary judgment motion on the newly added claims. (Exhibit O.) The District Court took no action on the State's motions.

In 1991, when the District Court learned that the State was preparing a mandamus petition against the court for failing to act on the summary judgment motions, the court ordered a status conference on the petition. (Exhibit P.) On October 4, 1991, the District Court vacated the State's summary judgment motions, and allowed Correll to amend his petition one more time. (Exhibit Q.)

On December 6, 1991, Correll filed his Third Amended Petition for Writ of Habeas Corpus. (Exhibit R.) On February 14, 1992,

the State again filed a Motion for Summary Judgment. (Exhibit S.) On May 15, 1992, Correll filed a response to the State's summary judgment motion, and the State replied on May 29, 1992. In conjunction with his response to the motion for summary judgment, Correll moved to expand the record with material never presented to the state courts. (Exhibit T.) The State objected to the motion. (Exhibit U.) On June 19, 1992, the District Court heard argument on the respective motions and stated, "The court will enter a formal written order in this matter." (Exhibit V.)

After waiting over 9 months for the Court's written order, the State filed a request for ruling. (Exhibit W.) The State pointed out the extreme length of time that had passed since Correll filed his original petition with the court. (Exhibit W at 2.) The State asked, pursuant to *In re Blodgett*, __ U.S. __, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992), that the court "exercise all due diligence and render its opinion forthwith." The District Court has not responded to the State's request for ruling, nor has it ruled on the State's Motion for Summary Judgment.

***Villafuerte v. Lewis*, No. CIV-91-0729-PHX-SMM.**

Jose Roberto Villafuerte is an inmate in the Arizona State Prison sentenced to be executed. On May 9, 1991, Villafuerte filed a preliminary Petition for Writ of Habeas Corpus and an Application

for Stay of Execution in the District Court. (Exhibit A.) On May 14, 1991, the District Court issued a stay of the execution and appointed counsel for Villafuerte. (Exhibit B.) On July 19, 1991, Villafuerte filed an amended petition. (Exhibit C.) On August 26, 1991, Respondents filed a motion for summary judgment on all issues in the amended petition. (Exhibit D.) Villafuerte filed a response and Respondents filed a reply. On March 16, 1992, the District Court heard oral argument on the motion for summary judgment. As of this date, the District Court has not ruled on Respondents' motion for summary judgment although more than 15 months have passed since oral argument on the motion.

***Chaney v. Lewis*, No. CIV-85-2266-PHX-RCB.**

The Arizona Supreme Court affirmed Chaney's conviction and death sentence in *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1265 (1984). Chaney filed a federal habeas corpus petition on October 8, 1985. (Exhibits A and B.) The District Court denied the petition, and Chaney appealed. This Court remanded the case on November 28, 1986. *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987). After remand, the State requested that the District Court set a briefing schedule. (Exhibit C.) The District Court granted the State's request, and the State filed its Answer on July 17, 1987. (Exhibits D and E.) The District Court

stayed the proceedings on January 13, 1989, pending a mandate in *Adamson v. Ricketts*. (Exhibit A.) After the United States Supreme Court issued *Walton v. Arizona,*[2] the State requested a ruling on the merits on March 7, 1991. (Exhibit A.) In October 1991, the State requested that the District Court lift its stay. (*Id.*)

Chaney then changed counsel. (Exhibit A.) The District Court ordered Chaney's new counsel to file an amended petition by February 14, 1992. (Exhibit F.) In April 1992, the District Court advised Chaney's counsel that further continuances for the amended petition would not be granted. (Exhibit H.) Chaney then requested that his federal petition be held in abeyance so that he could return to the state court to pursue yet another petition for post-conviction relief. (Exhibit H.) The State opposed Chaney's request. (Exhibit I.)

Chaney finally filed has amended petition on September 4, 1992. (Exhibit J.) The State responded on November 3, 1992. (Exhibit K.) In December 1992, the District Court acknowledged that briefing was complete and the motion to hold in abeyance would be ruled upon as quickly as possible. (Exhibit L.) In March 1993, the State again asked for a ruling on the merits. (Exhibit M.) The District Court has not responded to the State's request, nor ruled on

---

2. *497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).*

the merits of the petition.

***Arnett v. Lewis*, No. CIV-83-2157-PHX-SMM.**

The Arizona Supreme Court first affirmed Arnett's conviction and death sentence in *State v. Arnett,* 119 Ariz. 38, 579 P.2d 542 (1978). Following the attack on the constitutionality of Arizona's death penalty statute, Arnett was resentenced and that sentence was affirmed in *State v. Arnett*, 125 Ariz. 210, 608 P.2d 778 (1980). Arnett filed his federal petition in 1983. (Exhibit B.) Arnett had failed to exhaust some of the issues he raised so while his petition was pending he returned to state court. (Exhibit C.) Arnett filed partial summary judgment motions and in February 1987, the District Court ruled on those motions. The court granted partial relief to Arnett to include another resentencing, and an evidentiary hearing on the voluntariness of his confession. (Exhibit D.)

On March 6, 1987, the State sought a stay from the District Court because the Arizona Supreme Court had decided to hear Arnett's new state claims on the merits. (Exhibit E.) The District Court granted the stay. (Exhibit A.) In 1988, the Arizona Supreme Court again affirmed the conviction and death sentence in *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988). The State asked the District Court to lift the stay and grant a rehearing. (Exhibit F.) Arnett then asked to amend his petition to include the new issues recently

decided by the Arizona Supreme Court. (Exhibit G.) The District Court lifted the stay but denied the State's motion for rehearing. The District Court allowed Arnett to amend his petition. (Exhibit H.)

For 2 years, discovery took place in anticipation of the federal evidentiary hearing on the voluntariness issue. (Exhibit A.) The parties filed memorandums on the admissibility of evidence. (Exhibits I, J, and K.) In April 1992, Arnett filed a fourth motion for partial summary judgment on his amended petition. (Exhibit L.) The State filed its response on May 13, 1992. (Exhibit M.) The District Court has not ruled on Arnett's motion, nor has it set a date for the evidentiary hearing.

Ceja v. Lewis, No. CIV-84-2322-PHX-RCB.

Jose Jesus Ceja is an inmate in the Arizona State Prison sentenced to be executed. On December 14, 1984, Ceja filed a Preliminary Petition for Writ of Habeas Corpus and an Application for Stay of Execution. (Exhibits A and B.) On December 14, 1984, the District Court of Arizona issued an order staying the scheduled execution of Ceja. (Exhibit C.) On February 28, 1985, Ceja moved to stay the federal proceedings pending the resolution of state post-conviction relief proceedings pending in state court. (Exhibit D.) The State opposed the motion to stay the proceedings. (Exhibit E.)

On March 28, 1985, the District Court granted Ceja's motion to stay the federal proceedings pending the disposition of proceedings in state court. (Exhibit F.)

On November 19, 1986, Ceja filed an Amended Petition for Writ of Habeas Corpus. (Exhibit G.) On May 6, 1987, the State moved to dismiss Ceja's petition for habeas corpus relief. (Exhibit H.) On June 24, 1987, Ceja moved to strike the State's motion to dismiss. (Exhibit I.) On July 6, 1987, the State replied to Ceja's motion to strike. (Exhibit J.) On October 9, 1987, the District Court denied Ceja's motion to strike, and ordered that Ceja file a response to the State's pending motion to dismiss within 10 days of the Court's order. (Exhibit K.) On November 30, 1987, Ceja filed a response to the State's motion to dismiss. (Exhibit L.) On February 5, 1988, the State replied. (Exhibit M.) On October 18, 1988, the District Court: (1) granted the State's motion to dismiss; (2) directed that the stay of execution would be vacated unless Ceja filed an amended petition for writ of habeas corpus deleting those claims which the District Court determined were unexhausted; (3) ordered that if Ceja elected to amend his petition by deleting his unexhausted claims, Ceja must at the time of filing his amended petition file a statement showing cause and prejudice regarding the 20 claims which were held to be procedurally barred by the Arizona state courts. (Exhibit

N.) On November 1, 1988, Ceja filed a motion to amend and stay the District Court's order of October 18, 1988, and a motion to reconsider and vacate the October 18, 1988 order. (Exhibits O and P.) On November 3, 1988, the District Court granted Ceja's motion to stay the enforcement of the October 18, 1988 order. (Exhibit Q.) On November 16, 1988, the State opposed Ceja's motion to reconsider and vacate the October 18, 1988 order. (Exhibit R.)

On December 5, 1988, the District Court held oral argument on Ceja's motion to reconsider and vacate the memorandum and order. The District Court took the matter under advisement. On May 1, 1989, Ceja filed a motion for partial summary judgment. (Exhibit S.) On May 24, 1989, the State moved to strike Ceja's motion for partial summary judgment. (Exhibit T.)

On July 22, 1989, the District Court ruled on Ceja's motion for reconsideration of the court's October 18, 1988 memorandum and order. The court ruled as follows: (1) denied Ceja's motion for reconsideration concerning issue 3—destruction of "gruesome photographs" and issue 4 concerning the jury instruction on malice; (2) granted Ceja's motion for reconsideration concerning issue 8—single form of the verdict and issue 12—Dr. Karnitschnig's affidavit —by holding that the District Court could hear those claims on the merits; (3) stayed any further action in the matter pending receipt of

the mandate from this Court in *Adamson v. Ricketts*; and (4) ordered that the action would not be dismissed and that the stay of execution would stay in effect until further order of the court. (Exhibit U.)

On November 4, 1991, after the United States Supreme Court decided *Walton v. Arizona,* and *Lewis v. Jeffers,* 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990), the State moved to vacate the District Court's stay of July 22, 1989. (Exhibit V.) On December 18, 1991, the State filed a motion to reconsider the District Court's order of July 22, 1989. (Exhibit W.)

On January 27, 1992, Ceja filed a response to the State's motion for reconsideration. (Exhibit X.) On February 18, 1992, the District Court held oral argument on the State's motion to reconsider. The court indicated that it would rule shortly on the motion, and ordered Ceja to make his final *McCleskey* determination. (Exhibit Y.) On April 30, 1992, Ceja notified the District Court that he was unaware of any other claims. (Exhibit Z.)

On March 12, 1993, the State requested the District Court to rule on its motion for reconsideration. (Exhibit AA.) The District Court has not ruled on the State's request for ruling, or the motion for reconsideration.

ISSUE PRESENTED

Is District Court of Arizona taking "all steps necessary to ensure

a "***prompt resolution***" of the capital habeas corpus cases pending before it?

RELIEF REQUESTED

Due to the inexcusable neglect that the District Court of Arizona has exhibited toward Arizona's capital cases, the State requests that this Court establish time periods within which the District Court must rule upon a capital habeas corpus petition, and order the District Court to rule on the present cases within those guidelines or show cause why those judges should not be held in contempt.

REASONS WHY THE WRIT SHOULD ISSUE

BECAUSE THE DISTRICT COURT HAS GRANTED STAYS OF EXECUTION IN THESE CAPITAL CASES, IT HAS A DUTY TO TAKE ALL STEPS NECESSARY TO ENSURE THE PROMPT RESOLUTION OF THE CASE; A DUTY THE DISTRICT COURT OF ARIZONA HAS FAILED TO FULFILL.

Under the All Writs Act, 28 U.S.C. § 1651(a), the federal courts of appeals may issue a wit of mandamus when it is "necessary or appropriate in aid of their respective jurisdictions." *Will v. Calvert Fire Insurance Company*, 437 U.S. 655, 661, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185 (1943). The United States Supreme Court has long recognized this authority, and stated when it should be used.

> Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refused to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case.

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872). Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has abused its discretion. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85, 90 S. Ct. 1648, 26 L. Ed.

2d 100 (1970); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957).

The United States Supreme Court stated that it would not tolerate unreasonable delay in a capital case, and such delay could be the basis of a mandamus petition:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty ***to take all steps necessary to ensure a prompt resolution of the matter***, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, __ U.S. __, 112 S. Ct. 674, 676, 116 L. Ed. 2d 669 (1992) (emphasis added). The State of Arizona maintains that the District Court of Arizona has abused its discretion in the instant cases by not following the dictates of *In re Blodgett* and promptly resolving the matters before it.

In *In re Cement Antitrust Litigation (MDL NO. 296)*, 688 F.2d 1297 (9th Cir. 1982), this Court explained in detail the guidelines it would use to determine whether a mandamus petition was an appropriate remedy in a particular case. The guidelines described are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief they desire; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the District Court's actions are clearly erroneous as a matter of law; (4) whether the claimed

error is oft repeated error or "manifests persistent disregard for the federal rules"; and (5) whether the petition raises new and important issues of law of first impression. 688 F.2d at 1301 (citing *Bauman v. United States District Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)). This Court refers to these five guides as the *Bauman* factors. *Id.* In *In re Cement Antitrust*, this Court noted that related considerations included whether the injury alleged by the petition was not correctable on appeal; whether the petition presents an issue that would repeatedly evade appellate review; or whether "there are other compelling factors relating to the efficient and orderly administration of the district courts." 688 F.2d at 1301. The State believes that, upon review of the *Bauman* guidelines and the related considerations noted in *In re Cement Antitrust*, all indications show that this Court should accept the instant petition and grant the relief requested by the State of Arizona.

A. MANDAMUS IS THE ONLY AVAILABLE MEANS TO ENSURE THE PROMPT RESOLUTION OF THE INSTANT CASES.

The first two *Bauman* guidelines are designed to insure that mandamus is the appropriate remedy. *In re Cement Antitrust*, 688 F.2d at 1301. A petition for writ of mandamus to a higher court is the appropriate action when an inferior court refuses to act on a case pending before it.

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins., 437 U.S. at 661-62 (quoting *Insurance Company v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1872)); *Ex Parte Newman*, 81 U.S. (14 Wall.) at 165. The State of Arizona has no other available remedy to ensure a prompt resolution of these cases except a mandamus petition.

Regarding the prejudice facing the State, the United States Supreme Court recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas corpus petition.

> None of the reasons offered in the response dispels our concern that the State of Washington has sustained ***severe*** prejudice by the ***two-and-a-half*** year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [*McCleskey v. Zant*] when discussing the importance of finality in the context of federal habeas corpus proceedings.

In Re Blodgett, 112 S. Ct. at 676, 116 L. Ed. 2d at 674 (citation omitted, emphasis added). As with the State of Washington in *Blodgett*, Arizona is suffering a severe diminution of its sovereign power:

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but ***the power***

> ***of a state to pass laws means little if the state cannot enforce them.***

McCleskey v. Zant, __ U.S. __, 111 S. Ct. 1454, 1469, 113 L. Ed. 2d 517, 543 (1991) (emphasis added). The diminution of sovereignty is even greater for the State of Arizona in these cases because the federal courts have prevented the State from enforcing its criminal laws against each of the inmates for considerably longer than the "two-and-a-half" years condemned by the Court in *Blodgett*.

The District Court's apparent endless search for epistemological certainty on the issues before issuing a decision damages the very justice the court seeks:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 111 S Ct. at 1469, 113 L. Ed. 2d at 543 (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452-53 (1963)). A court immobilized in its search for justice provides none. The District Court's duty is not to achieve absolute certainty on an issue before it, but simply, after due consideration, to decide it:

With whatever doubts, with whatever difficulties, a case may

> be attended, we must decide it, if it be brought before us. ***We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.***

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (emphasis added). Ever-delayed justice is no justice at all.

The State of Arizona has clearly shown that under the first two *Bauman* factors the delay caused by the District Court's failure to rule can only be addressed in a mandamus petition and the State is prejudiced by the District Court's inaction. *In re Cement Antitrust*, 688 F.2d at 1301–02.

B. THE DISTRICT COURT'S FAILURE TO RULE PROMPTLY ON THE ISSUES BEFORE IT IS BEING OFT REPEATED, MANDATING THAT THIS COURT ACCEPT THE PETITION AND SUPERVISE THE ORDERLY ADMINISTRATION OF THE FEDERAL DISTRICT COURT OF ARIZONA.

The fourth and fifth factors noted in *Bauman* relate to whether the District Court is engaging in oft repeated error, or manifests a persistent disregard of its duty under law.[3] *In re Cement Antitrust*, 688 F.2d at 1303–04. The fourth and fifth factors also deal with whether the District Court's action presents new and important

---

3. The State has not discussed the third factor separately because the State is not seeking redress from a District Court order, but from the court's failure to rule. Therefore, the third factor is not directly relevant to the Court's inquiry because the failure or refusal to rule on a case properly before the court is without question the proper subject of a mandamus petition. Ex Parte Newman.

problems, or issues of first impression. *Id.* These factors also weigh in favor of the State in this Court's consideration of whether to accept the State's petition and grant the relief requested.

The attached chart shows the pervasiveness of the problem the State seeks to redress. Not only are the five selected cases abysmal in and of themselves, but in looking at the attached cases pending in the District Court, it is clear that the District Court of Arizona does not handle capital habeas corpus petitions in an expeditious fashion. Besides *Blazak v. Lewis*, 971 F.2d 1408 (9th Cir. 1992), the District Court has not finally disposed of a first petition in any capital case pending in that court for over 3 years.[4] Such a problem deserves drastic action by this Court.

In deciding whether to issue the supervisory mandamus petition, the Court is faced with an issue of first impression. Not only does the State seek an order from this Court directing the District Court to rule within a time certain on the six cases directly challenged in this mandamus petition; the State also requests that this Court, in its supervisorial authority, establish time periods within which the District Court must rule in capital habeas corpus petitions and direct

---

4. The 3 years is of particular concern because it has been over 3 years since the United States Supreme Court upheld the Arizona Death Penalty statute in Walton v. Arizona.

the lower court to rule on all motions in all pending capital cases within those time limits. This request is a case of first impression, and is necessary to the orderly administration of justice.

As noted above, generally it is within a court's discretion when to issue an opinion. However, in *Blodgett*, the United States Supreme Court stated that the federal courts had a "duty" in capital cases to "***take all steps necessary to ensure a prompt resolution of the matter.***" 112 S. Ct. at 676, 116 L. Ed. 2d at 676 (emphasis added). Clearly the District Court of Arizona has failed to follow the *Blodgett* mandate. That leaves this Court and the State of Arizona with two options: First, the State may petition, in every capital case pending in the District Court, or those cases to be filed in the future with the District Court, for a mandamus petition every time the District Court fails to rule promptly on a motion. Such a ruling would require constant inquiries by this Court in hundreds of cases. Such a procedure would consume valuable court and attorney time.

The second option is for this Court to order that, in all capital cases pending before the District Court, that court has to rule within specified times on motions once they come at issue. The failure to rule within the time limit would be a prima facia case that the court has not complied with the *Blodgett* mandate, subjecting the lower

court to an order to show cause. This option would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case.

The State believes the second alternative is clearly preferable to the first. The *Blodgett* mandate is clear, federal courts must establish procedures and practices to ensure "***prompt***" resolution of habeas corpus petitions in capital cases. The District Court of Arizona has failed to do so. This Court must exercise control and establish guidelines that the lower court must obey. Setting time limits for ruling on motions allows the lower court some flexibility, but assures the State that the District Court's current practice of allowing Arizona's capital cases to languish in the District Court for 10 or more years before ruling will cease.

C. THE STATE REQUESTS THAT THIS COURT EXERCISE ITS SUPERVISORIAL AUTHORITY AND ESTABLISH A 120-DAY TIME LIMIT FOR RULING ON DISPOSITIVE MOTIONS, A 30-DAY TIME LIMIT FOR RULING ON PROCEDURAL MOTIONS, AND A 180-DAY TIME LIMIT FOR SCHEDULING AN EVIDENTIARY HEARING.

The State of Arizona believes that it should not take the District Court more than 120 days after a dispositive motion is at issue to rule. Likewise, it should not take the District Court more than 30 days after a procedural motion is at issue to rule on the merits of the motion. The entire state court record is before the court, with record

citations and state court opinions. The parties will have briefed the issues citing the relevant cases. These time limits are ample time for the court to rule.

When the District Court determines that an evidentiary hearing is required, the State believes that the hearing should be set within 180 days. One hundred and eighty days is more than the speedy trial provisions of both the state and federal courts. It is baffling to the State why an evidentiary hearing in a collateral proceeding should require more preparation time than the trial.

The District Court of Arizona has failed to promptly resolve these habeas corpus petitions, and it is incumbent that this Court ensure that the mandate in *In re Blodgett* is satisfied. The State believes that establishing these time limits for the District Court to rule on pending capital habeas corpus petitions is not only warranted, but absolutely necessary for the orderly administration of justice.

CONCLUSION

For all of the above stated reasons, the State of Arizona respectfully requests that the Court grant the writ and order the respondent court to render its decision on the dispositive motions within 120 days, or rule on the procedural motions within 30 days. The State further requests that the District Court be ordered to hold the evidentiary hearing in *Arnett* within 180 days. Furthermore, the State prays that the Court exercise its supervisorial authority and order that the District Court shall rule on all future capital cases within the time limits established, or it will be deemed to be prima facie evidence that an order to show cause is warranted.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

/S/

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

Attorneys for PETITIONERS

CERTIFICATE OF SERVICE

TWO COPIES of this Petition were deposited for mailing this 1st day of July, 1993, to:

HONORABLE STEVEN M. McNAMEE
United States District Court
230 North First Street
Phoenix, Arizona 85025

HONORABLE ROBERT C. BROOMFIELD
United States District Court
230 North First Street
Phoenix, Arizona 85025

BRIAN R. DANDO
1527 East Colter, #3
Phoenix, Arizona 85014
Attorney for REAL PARTIES IN INTEREST CORRELL

DANIEL D. MAYNARD
2300 Great American Tower
3200 North Central Avenue
Phoenix, Arizona 85012
Attorney for REAL PARTIES IN INTEREST VILLAFUERTE

MICHAEL TERRIBLE, P.C.
318 West Roosevelt
Phoenix, Arizona 85003
Attorney for REAL PARTIES IN INTEREST CHANEY

JOHN TREBON
Security Pacific Bank Building
121 East Birch Avenue, Suite 207
Flagstaff, Arizona 86001
Attorney for REAL PARTIES IN INTEREST ARNETT

CHARLES C. VAN COTT

MICHAEL W. PATTEN
2901 North Central Avenue
P.O. Box 400
Phoenix, Arizona 85001-0400
Attorneys for REAL PARTIES IN INTEREST CEJA

/S/

Janet Dyer
ADMINISTRATIVE ASSISTANT
CRIMINAL APPEALS SECTION
1275 WEST WASHINGTON
PHOENIX, ARIZONA
85007-2997

CRM87-1160
CR871160.man

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. _____

SAMUEL L. LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, et al.,

PETITIONERS,

-vs-

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

RESPONDENT,

MICHAEL EMERSON CORRELL, et al.,

Real parties in interest.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NOS. CIV-87-1471-PHX-SMM CIV-91-0729-PHX-SMM, CIV-85-2266-PHX-RCB, CIV-83-2157-PHX-SMM, CIV-84-2322-PHX-RCB

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases other than those contained in the chart

attached.

DATED this 1st day of July, 1993.

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS
SECTION

Attorneys for
PETITIONERS

CASES PENDING IN FEDERAL DISTRICT COURT AS OF JULY 1, 1993

NAME	CASE NUMBER	PETITION FILED
Arnett	CIV-83-2157-PHX-SMM	10/24/83
Bishop	CIV-83-2162-PHX-EHC	11/4/83
Ortiz	CIV-84-0955-TUC-WDB	12/7/84
Woratzeck	CIV-84-1783-PHX-CAM	9/24/84
Ceja	CIV-84-2322-PHX-RCB	12/14/84
Libberton	CIV-85-0249-PHX-EHC	1/31/85
Gretzler	CIV-85-0537-TUC-RMB	6/10/85
Gerlaugh	CIV-85-1647-PHX-RGS	7/12/85
Chaney	CIV-85-2266-PHX-RCB	10/8/85
Martinez-Villarreal	CIV-86-0296-TUC-RMB	6/9/86
Zaragoza	CIV-86-0714-PHX-EHC	5/8/86
Smith, R.D.	CIV-87-0234-TUC-RMB	4/14/87
Lambright	CIV-87-0235-TUC-RMB	4/14/87
Smith, B.	CIV-87-0634-PHX-RCB	4/22/87
Nash	CIV-87-0716-PHX-EHC	5/6/87
Correll	CIV-87-1471-PHX-SMM	9/18/87
McMurtrey	CIV-88-0844-TUC-RMB	12/12/88
McCall	CIV-90-1440-PHX-CAM	10/02/90
Poland, M.	CIV-90-1822-PHX-SPK	11/20/90

Poland, P.	CIV-90-1823-PHX-RJK	11/20/90
Wallace	CIV-91-0315-TUC-WDB	6/5/91
Clabourne	CIV-91-0465-TUC-RMB	8/28/91
Amaya-Ruiz	CIV-91-0606-TUC-WDB	10/16/91
Villafuerte	CIV-91-0729-PHX-SMM	5/9/91
LaGrand, W.	CIV-92-0026-TUC-JMR	1/13/92
LaGrand, K.	CIV-92-0089-TUC-JMR	1/16/92
Vickers	CIV-92-0913-PHX-PGR	5/14/92
Moorman	CIV-92-1121-PHX-EHC	1/28/92
Beaty	CIV-92-2076-PHX-RGS	11/4/92
James	CIV-93-0869-PHX-RGS	5/4/93

[Filed July 21, 1993]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAMUEL L. LEWIS, Director, Arizona Department of Corrections;
GRANT WOODS, Attorney General,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA;
Respondent,

MICHAEL EMERSON CORRELL;
JOSE ROBERTO VILLAFUERTE;
ANTHONY LEE CHANEY;
JIMMY ALAN ARNETT;
JOSE JESUS CEJA,
Real Parties in Interest.

No. 93-70578

D.C. No.
CV-91-0729-PHX-SM
CV-87-1471-PHX-SM
CV-85-2266-PHX-RC
CV-84-2322-PHX-RC
CV-83-2157-PHX-SM
ARIZONA (PHOENIX)

ORDER

Before: BROWNING, TANG, and NORRIS, Circuit Judges.

The petition for writ of mandamus is denied.

MOTION FILED
OCT - / 1993

No. 93-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SAMUEL LEWIS, Director,
Arizona Department of Corrections, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA,
Respondent,

MICHAEL EMERSON CORRELL,
JOSÉ ROBERTO VILLAFUERTE, JIMMY ALLAN ARNETT,

Real Parties in Interest.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

QUESTION PRESENTED

Does the law provide a remedy for the failure of a District Court in a habeas corpus case to fulfill its duty under *In re Blodgett* "to take all steps necessary to ensure a prompt resolution of the matter . . ."?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SAMUEL LEWIS, Director,
Arizona Department of Corrections, et al.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA,

Respondent,

MICHAEL EMERSON CORRELL,
JOSÉ ROBERTO VILLAFUERTE, JIMMY ALLAN ARNETT,

Real Parties in Interest.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but respondent court and counsel for the real parties in interest have not consented.

In the accompanying brief, *amicus* argues that the state has been wronged by the inexcusable delay in this case and that mandamus is the appropriate relief. Further, review of this case on certiorari is necessary to eliminate the gross disparities in justice between districts

which process their habeas cases and those which obstruct them.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The federal district courts in Arizona have needlessly delayed enforcement of the state's death penalty, reducing its deterrent effect. This delay is contrary to the rights of victims and society which CJLF was formed to advance.

For the foregoing reason, *amicus* requests leave to file its brief.

October, 1993

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

Question presented i

Motion for leave to file iii

Interest of *amicus curiae* iv

Table of authorities vi

Brief *amicus curiae* 1

Summary of facts and case 1

Jurisdiction 2

Summary of argument 3

Argument 3

I

Law and justice require prompt disposition of capital habeas cases 3

A. Justice delayed 3

B. Habeas corpus: secondary and limited 5

C. Habeas statutes and rules 8

D. Reasonable time 9

II

The present case is a textbook example of an appropriate case for mandamus 11

III

Certiorari is necessary to prevent gross disparities in the quality of justice 13

Conclusion 15

TABLE OF AUTHORITIES

Cases

Adams v. Peterson, 968 F. 2d 835 (CA9 1992) 7

Anderson v. Liberty Lobby, Inc., 477 U. S. 242,
91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) 7

Arave v. Creech, 123 L. Ed. 2d 188,
113 S. Ct. 1534 (1993) 4

Atlantic Coast Line R. Co. v. Locomotive Engineers,
398 U. S. 281, 26 L. Ed. 2d 234,
90 S. Ct. 1739 (1970) 5

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090,
103 S. Ct. 3383 (1983) 5

Brecht v. Abrahamson, 123 L. Ed. 2d 353,
113 S. Ct. 1710 (1993) 5

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347,
110 S. Ct. 1212 (1990) 7

Connor v. Coleman, 441 U. S. 792, 60 L. Ed. 2d 646,
99 S. Ct. 2400 (1979) 2

Estelle v. McGuire, 116 L. Ed. 2d 385,
112 S. Ct. 475 (1991) 6

Ex parte Bradstreet, 7 Pet. (32 U. S.) 634,
8 L. Ed. 810 (1833) 11

Ex parte Crane, 5 Pet. (30 U. S.) 190,
8 L. Ed. 92 (1831) 2, 11

Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859,
96 S. Ct. 2909 (1976) 14

Illinois v. Gates, 462 U. S. 213, 76 L. Ed. 2d 527,
103 S. Ct. 2317 (1983) 13

In re Blodgett, 116 L. Ed. 2d 669,
112 S. Ct. 674 (1992) 5

Johnson v. Rogers, 917 F. 2d 1283 (CA10 1990) 13

Keeney v. Tamayo-Reyes, 118 L. Ed. 2d 318,
112 S. Ct. 1715 (1992) 6

Life and Fire Ins. Co. v. Heirs of Wilson, 8 Pet.
(33 U. S.) 291, 8 L. Ed. 949 (1834) 12

Livingston v. Dorgenois, 7 Cranch (11 U. S.) 577,
3 L. Ed. 444 (1813) 12

Marbury v. Madison, 1 Cranch (5 U. S.) 137,
2 L. Ed. 60 (1805) 2

McClellan v. Carland, 217 U. S. 268, 54 L. Ed. 762,
30 S. Ct. 501 (1910) 2

McGautha v. California, 402 U. S. 183, 28 L. Ed. 2d 711,
91 S. Ct. 1454 (1971) 14

Murray v. Carrier, 477 U. S. 478, 91 L. Ed. 2d 397,
106 S. Ct. 2639 (1986) 6

People v. Allen, 42 Cal. 3d 1222, 232 Cal. Rptr. 849,
729 P. 2d 115 (1986) 4

Pulley v. Harris, 465 U. S. 37, 79 L. Ed. 2d 29,
104 S. Ct. 871 (1984) 5

Roche v. Evaporated Milk Assn., 319 U. S. 21,
87 L. Ed. 1185, 63 S. Ct. 938 (1943) 2, 11, 12

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 6

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674,
54 S. Ct. 330 (1934) 4

Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674,
104 S. Ct. 2052 (1984) 7

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 7

Thermtron Products, Inc. v. Hermansdorfer,
423 U. S. 336, 46 L. Ed. 2d 542,
96 S. Ct. 584 (1976) 12, 13

Tison v. Arizona, 481 U. S. 137, 95 L. Ed. 2d 127,
107 S. Ct. 1676 (1987) 4

Witherspoon v. Illinois, 391 U. S. 510, 20 L. Ed. 2d 776,
88 S. Ct. 1770 (1968) 4

Wright v. West, 120 L. Ed. 2d 225,
112 S. Ct. 2482 (1992) 7

United States Constitution

U. S. Const., Amdt. 6 3

U. S. Const., Amdt. 10 14

United States Statutes

Judiciary Act of 1789, § 13, 1 Stat. 81 11

28 U. S. C. § 473(a)(2)(B) 10

28 U. S. C. § 1254(1) 2

28 U. S. C. § 1257(a) 5

28 U. S. C. § 1651(a) 2

28 U. S. C. § 2243 9

28 U. S. C. § 2251 5

28 U. S. C. § 2253 2

Arizona Constitution and Statute

Ariz. Const., Art. 6 § 14(4) (Supp. 1992) 5

Ariz. Rev. Stat. Ann. § 13-4031 (Supp. 1992) 5

Rules of Court

Federal Rule of Civil Procedure 56(c) 7

Rules Governing Section 2254 Cases in the United States District Courts 9

Supreme Court Rule 10.1 ..... 14, 15

Treatises

W. Blackstone, Commentaries 4, 11

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986) 2

C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure (1977) 13

Miscellaneous

Advisory Committee's Note to Habeas Rule 8 9

The Federalist No. 22 (C. Rossiter ed. 1961) 15

National Conference of State Trial Judges, Standards Relating to Court Delay Reduction (1985) 10

Magna Carta, Art. 40 (1215) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SAMUEL LEWIS, Director,
Arizona Department of Corrections, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF ARIZONA,
Respondent,

MICHAEL EMERSON CORRELL,
JOSÉ ROBERTO VILLAFUERTE, JIMMY ALLAN ARNETT,

Real Parties in Interest.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Real parties in interest Correll, Villafuerte, and Arnett have all been convicted of murder and sentenced to death in the state courts of Arizona. All three sentences have been affirmed by the Supreme Court of Arizona. All three have filed habeas corpus petitions with respondent U. S. District Court for the District of Arizona. In all three cases, a motion for summary judgment has been pending for over a year.

The Arizona Attorney General petitioned the Court of Appeals for the Ninth Circuit for a writ of mandamus to compel action. That court denied the writ without any explanation.

On September 15, 1993, after the present certiorari petition was filed, the District Court set a date for an evidentiary hearing in *Arnett* but did not rule on the pending summary judgment motion. Also, on September 29, 1993, the District Court granted the state's motion for summary judgment in *Villafuerte*. Writ relief is no longer needed as to *Villafuerte*, see *Connor* v. *Coleman*, 441 U. S. 792 (1979), and there is a question as to mootness in *Arnett*. This brief will not address that question, as we understand it will be covered in other briefs to be submitted. In any event, there certainly remains a live controversy as to *Correll*.

JURISDICTION

The Court of Appeals had jurisdiction to issue the writ of mandamus under the All Writs Act, 28 U. S. C. § 1651(a). Issuance of the writ to an inferior court, as opposed to an executive officer, is an exercise of appellate jurisdiction. *Ex parte Crane*, 5 Pet. (30 U. S.) 190, 193 (1831); cf. *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 175-176 (1803).

The Court of Appeals has jurisdiction to issue writs in cases within its appellate jurisdiction, even though no appeal has yet been perfected. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25 (1943). This case is within that appellate jurisdiction. 28 U. S. C. § 2253.

The writ of certiorari is the appropriate method for this Court to review denial of a writ of mandamus, either under 28 U. S. C. § 1254(1), or under the All Writs Act, *McClellan* v. *Carland*, 217 U. S. 268, 277-278 (1910). R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 499 (6th ed. 1986).

SUMMARY OF ARGUMENT

The people of Arizona are entitled to a prompt disposition of these cases, both by law and as a matter of fundamental justice. Such promptness is feasible if the habeas court recognizes the limited, secondary nature of habeas corpus and properly applies the limitations on habeas relief.

The present case lies within the solid core of the historical writ of mandamus. The injustice being perpetrated here is precisely the kind which has historically justified issuance of the writ.

Certiorari is needed in this case to correct the disparities in the quality of justice which now exist between districts. Some states can enforce their capital punishment statutes while others cannot, based on the attitudes of the local federal bench rather than any genuine differences in their legal situations.

ARGUMENT

I. Law and justice require prompt disposition of capital habeas cases.

A. Justice Delayed.

"To none will we sell, to none deny *or delay*, right or justice." Magna Carta, Art. 40 (1215) (emphasis added). Delay of justice is a form of oppression, and it has been since ancient times. For this reason, a promise of swift justice was included in the cornerstone of Anglo-American liberty.

Similarly, a right to a speedy trial was included in the American Bill of Rights. U. S. Const., Amdt. 6. At the time of its enactment, this provision applied only to the federal government, and to this day it only benefits the defendant. At the time of enactment, there was no reason to apprehend that the federal courts would

obstruct justice to the detriment of the people. Only much later did the pendulum swing so far that it was even necessary to be concerned about fairness to the people. See *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (1934) (justice due also the accuser); *Witherspoon* v. *Illinois*, 391 U. S. 510, 535 (1968) (Black, J., dissenting) (people entitled to impartial jury).

While the Sixth Amendment speedy trial right does not apply directly to the prosecution, the principle of right and justice which underlies it applies fully. It is fundamentally wrong to drag out justice for decades, and that wrong is no less wrong when it is inflicted upon the original victim of the crime, the victim's family, or society as a whole, rather than on the defendant.

Ideal justice would provide for the sentence to be carried out immediately upon the entry of the verdict, and at common law there was only a short interval. 4 W. Blackstone, Commentaries 397 (1769). In modern times, however, recognition of the imperfections of the trial process has resulted in the creation of a multilayered system of review, so that execution of sentence is delayed for years after the completion of trial.

The fact that some delay is required, however, must not blind us to the injustice of delay. Each day that a valid sentence is delayed is a fresh injury. Each day, the family of the victim must live with the uncertainty of whether justice will ever be done. Each day raises the possibility of new crimes by the criminal, either within prison, see *Arave* v. *Creech*, 123 L. Ed. 2d 188, 195, 113 S. Ct. 1534, 1538 (1993), after escape, see *Tison* v. *Arizona*, 481 U. S. 137, 139-141 (1987), or by arrangement with persons on the outside, see *People* v. *Allen*, 42 Cal. 3d 1222, 1236-1244, 729 P. 2d 115, 120-125 (1986). Each day is an incremental loss in the deterrent effect.

When a federal court directly interferes with the enforcement of a state judgment, it takes a grave step. For this reason, Congress passed the Anti-Injunction Act,

flatly forbidding such interference, subject only to a few, narrow exceptions. *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 286-287 (1970).

Habeas corpus is one of the exceptions. 28 U. S. C. § 2251. This does not mean, however, that the stay of state proceedings is a matter to be taken lightly. Instead, as this Court has repeatedly recognized, the stay creates an obligation on the part of the federal court to proceed promptly. *In re Blodgett*, 116 L. Ed. 2d 669, 674-675, 112 S. Ct. 674, 676 (1992).

Justice delayed is justice denied. The District Court has an obligation to the people of Arizona to minimize the injustice.

B. Habeas Corpus: Secondary and Limited.

The trial of a capital case is a grave matter, requiring the highest degree of care. But the federal district court is not trying these cases. That jurisdiction is vested in the superior courts of Arizona, Ariz. Const., Art. 6 § 14(4) (Supp. 1992), and the trials were completed years ago.

Review on appeal of a capital case is an equally grave matter, and appellate review is an essential part of a constitutional system of capital punishment. See *Pulley* v. *Harris*, 465 U. S. 37, 49 (1984). Again, however, that jurisdiction is not vested in the federal district court. It is vested in the Supreme Court of Arizona, Ariz. Rev. Stat. Ann. § 13-4031 (Supp. 1992), subject to this Court's review on federal questions, 28 U. S. C. § 1257(a).

"The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983); accord, *Brecht* v. *Abrahamson*, 123 L. Ed. 2d 353, 370, 113 S. Ct. 1710, 1719 (1993). Hence, this Court has endeavored to "confin[e] collateral relief to cases that involve *fundamental* defects or omissions inconsistent with the *rudimentary* demands of fair procedure." *Brecht*, 123 L. Ed. 2d, at 375, 113 S. Ct., at 1723 (Stevens, J., concur-

ring) (emphasis added). Because of this secondary, limited role, there are a number of limitations on habeas corpus which, when *properly* applied, serve to whittle down the issues which actually require decision in the district court to a scope considerably smaller than those which need to be considered by the state courts.[1]

First, questions of state law are not proper subjects of federal habeas review at all. *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475, 480 (1991). Second, the presence of a single claim which has not been presented to the state courts and which is not barred there requires dismissal of the entire petition. *Rose* v. *Lundy*, 455 U. S. 509, 522 (1982). If the claim is barred, it may not be considered except in the rare cases where an "objective factor external to the defense" prevented its timely presentation, *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986), or the extremely rare cases where the defendant is actually innocent, *id.*, at 496.

Habeas review is thus limited, for the most part, to federal constitutional claims already presented to and passed on by the state courts. Even within this restricted scope, the issues to be decided are confined on both ends by the limited nature of habeas review.

On questions of fact, the law requires deference to the state court findings, absent an applicable exception. The petitioner's negligence in developing his case is not one of the exceptions. As with procedural default, an objective, external factor is generally required. *Keeney* v. *Tamayo-Reyes*, 118 L. Ed. 2d 318, 330, n. 5, 112 S. Ct. 1715, 1720 (1992).

---

1. We emphasize "properly" because evasion of these limits results in the needless multiplication of issues. For example, if the procedural default rule is properly applied, the vast majority of claims not made on appeal need not be considered on habeas. If the rule is evaded, however, the habeas court must both attempt to justify the evasion and rule on the merits of the claim.

Much more importantly for the present case, the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) severely limits the issues of law to be decided. In each of the three underlying cases, the long-delayed ruling is on a motion for summary judgment. See Pet. Cert. 6, 7, 8. Such a motion necessarily presents questions of law based upon facts not genuinely in dispute. See Federal Rule of Civil Procedure 56(c); *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 258 (1986).

The *Teague* question is addressed as a threshold issue. *Teague*, *supra*, 489 U. S., at 316. If the question is one of "pure law," as opposed to a mixed question of law and fact, the district court's task under *Teague* is not to resolve the difficult and subtle nuances of constitutional doctrine, but instead to ask whether reasonable minds could differ, *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990), a much more straightforward question. If the merits of the question are difficult, it is "susceptible to debate among reasonable minds," *ibid.*, and the rule petitioner seeks would be a "new rule."

The principal questions of law in habeas corpus, then, are in the mixed questions of law and fact. Because there was no majority opinion in *Wright* v. *West*, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992), it would appear to be the law for the time being that the district court must review the "mixed questions" *de novo*. See, *e.g.*, *Strickland* v. *Washington*, 466 U. S. 668, 698 (1984).

These questions may be subtle and difficult, and *amicus* does not seek to minimize the importance of the district court's decision. The issue here is how much time is required to decide these questions, and for this purpose it is important to bear in mind that these issues will be redecided *de novo* on appeal. *Adams* v. *Peterson*, 968 F. 2d 835, 843 (CA9 1992) (en banc). Furthermore, a district court judge does not need to circulate drafts and put together a majority, as appellate court judges do. The judge need only explain his or her own reasoning and

decide the issues. The judge should therefore be able to decide more quickly than an appellate court.

C. Habeas Statutes and Rules.

The statutes and rules governing habeas corpus shed some light on the amount of time which should be required for a decision:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall *forthwith* award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> "The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be *returned within three days* unless for good cause additional time, not exceeding twenty days, is allowed.
>
> "The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.
>
> "When the writ or order is returned a day shall be set for hearing, *not more than five days* after the return unless for good cause additional time is allowed.
>
> "Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.
>
> "The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.
>
> "The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

> "The court shall *summarily* hear and determine the facts, and dispose of the matter *as law and justice require*." 28 U. S. C. § 2243 (emphasis added).

It is evident from this statute that Congress intended that habeas corpus be a speedy proceeding. Times are stated in days, not months and certainly not years. These specific times are no longer practical, given the complexity of the issues now deemed cognizable on habeas. Yet the statute still stands as an unmistakable declaration that habeas corpus should be a summary procedure.

The specific times stated in section 2243 have now been superseded by the Rules Governing Section 2254 Cases in the United States District Courts, cited below as the "Habeas Rules." Habeas Rule 8(c) requires a hearing "as promptly as practicable."

"[S]ubdivision (c) provides more flexibility [than section 2243] to take account of the complexity of the case, the availability of important materials, the workload of the attorney general, and the time required by appointed counsel to prepare." Advisory Committee's Note to Habeas Rule 8, 28 U. S. C., p. 425 (1988 ed.).

While the Habeas Rules provide some needed flexibility, they do not purport to alter the basic nature of the proceeding. The Congressional command to "*summarily* . . . dispose of the matter as law and justice require," 28 U. S. C. § 2243 (emphasis added), remains in force. Justice requires that justice not be unnecessarily delayed.

D. Reasonable Time.

The key question remains, what amount of time is reasonable to dispose of a habeas corpus petition? Guidelines established for civil disputes are instructive for establishing some outer limits.

Ordinary civil litigation deals with raw disputes, while federal habeas corpus warms over material which is already overcooked by the time it reaches federal court.

Hence, habeas corpus cases should be processed from start to finish in *less* time than original civil cases.

The National Conference of State Trial Judges has established a standard for the disposition of general civil matters:

> "A. General Civil—90% of all civil cases should be settled, tried or otherwise concluded within 12 months of the date of case filing; 98% within 18 months of such filing; and the remainder within 24 months of such filing except for individual cases in which the Court determines exceptional circumstances exist and for which a continuing review should occur."

National Conference of State Trial Judges, Standards Relating to Court Delay Reduction § 2.52, at 11 (1985). Along the same lines, Congress has set a standard of 18 months from the filing of a raw dispute to the commencement of trial in most civil cases. 28 U. S. C. § 473(a)(2)(B).

Death penalty law is complex, to be sure, but so are antitrust, securities, and RICO. If these cases can be resolved in a year or two from the filing of a raw dispute, the secondary, limited, re-review of warmed-over disputes on habeas corpus can surely go at least as fast.

In the cases underlying the present petition, the district court has taken longer to rule on summary judgment motions than it should take to dispose of the case from start to finish. The District Court took a year and a half to rule on a summary judgment motion in *Villafuerte*. Pet. Cert. 7. Motions have been pending for a year in *Correll*, Pet. Cert. 6, and over a year in *Arnett*, *id.*, at 8. The latter case, altogether, has been pending on habeas corpus an *entire decade*. *Id.*, at 7. That is absolutely inexcusable.

The people of Arizona have a right to reasonably prompt handling of these cases. That right has been violated. The only question is whether the law affords a remedy. It does: the writ of mandamus.

II. The present case is a textbook example of an appropriate case for mandamus.

For centuries, the writ of mandamus has been the law's remedy for "refusal or neglect of justice." 3 W. Blackstone, Commentaries 109 (1768).

> "A *mandamus* therefore lies . . . to compel the holding of a court . . . . [I]t issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, *whenever the same is delayed*. For it is the peculiar business of the court of king's bench, to superintend all other inferior tribunals . . . and this, not only by restraining their excesses, *but also by quickening their negligence, and obviating their denial of justice*." *Id.*, at 110-111 (emphasis added).

When Congress first established the courts of the United States, it expressly authorized this Court "to issue writs of mandamus, (d) in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Judiciary Act of 1789, § 13, 1 Stat. 81. With no more precise direction from the legislative branch, this Court looked for guidance to the common law, and for guidance on the common law, the Court looked to Blackstone. Thus, in *Ex parte Crane*, 5 Pet. (30 U. S.) 190, 192 (1831), Chief Justice Marshall set forth the function of the writ by quoting the above passage from Blackstone.

From the beginning, it has been the core function of the writ of mandamus to compel the lower court to decide when it has improperly failed to do so. Mandamus is, of course, not a substitute for appeal, *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943), but if the lower court never rules, there will never be an appeal. Thus in *Ex parte Bradstreet*, 7 Pet. (32 U. S.) 634, 647-648 (1833), this Court granted mandamus to a district judge to reinstate and try a case, because otherwise the plaintiff would have

been deprived of her right to bring the case up on appeal. In *Livingston* v. *Dorgenois*, 7 Cranch (11 U. S.) 577, 579-580 (1813), the district court had "finally stayed" the action at the request of the government, which was not a party. The Court issued "*mandamus nisi* . . . in the nature of a *procedendo*" to compel trial of the case. *Id.*, at 589.

Life and Fire Ins. Co. v. *Heirs of Wilson*, 8 Pet. (33 U. S.) 291 (1834) noted the special need for mandamus to resolve the predicament of the litigant in a case where the judge refuses to enter judgment. Mandamus "is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it." *Id.*, at 303. The Court issued the writ to compel a judge to sign a judgment previously rendered. *Id.*, at 304.

There are many cases in which this Court has held mandamus to be improper, yet these decisions uniformly acknowledge the core function of mandamus as set forth in Blackstone and the cases discussed above. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 (1943) contains one of the more extensive discussions of the writ of mandamus. *Roche* notes that where the question will ultimately be reviewable on appeal, appellate courts will not review the question by mandamus. *Id.*, at 26. However, *Roche* explicitly distinguishes the situation of "a refusal by the district court to adjudicate issues properly presented to it," in which case mandamus is appropriate. *Id.*, at 27.

Thermtron Products, Inc. v. *Hermansdorfer*, 423 U. S. 336 (1976) addresses the failure of a district court to accept a case merely because of the crowded state of its docket. In that case, the district court remanded a diversity case to state court solely for that reason. *Id.*, at 340-341. The *Thermtron* Court reviewed the cases on mandamus and stated that "these cases would support the use of mandamus to prevent nullification of the removal

statutes by remand orders resting on grounds having no warrant in the law." *Id.*, at 353.[2]

In the present case, the district court has effectively nullified a law vastly more important than the removal statutes. The prohibition and punishment of murder is far and away the single most important function of state government. See *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). The district court has, in effect, made a mockery of that law, at best because it is too busy, at worst out of deliberate obstruction. Mandamus is proper to enforce the prisoner's right to speedy consideration of a habeas petition, *Johnson* v. *Rogers*, 917 F. 2d 1283 (CA10 1990), and it is no less proper for the benefit of the people.

In relatively recent history, there has been a controversial expansion of the use of mandamus for "supervisory" and "advisory" functions. See 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3934, at 228-242 (1977). The present petition does not depend on that extension. It falls squarely within the solid core of the traditional, centuries-old writ. "[I]f a judge simply delays too long in deciding a pending case, a writ may issue on the ground that undue delay is tantamount to failure to exercise jurisdiction." *Id.*, § 3933, at 223.

III. Certiorari is necessary to prevent gross disparities in the quality of justice.

In the preceding two parts, *amicus* has discussed why the Court of Appeals should have issued a writ of mandamus. The more immediate question is why this Court should grant a writ of certiorari to review that decision.

---

2. There is a dissent in *Thermtron*, but it is based solely on a special statute for removal cases, not pertinent here. *Id.*, at 353-361 (opinion of Rehnquist, J.).

Supreme Court Rule 10.1 lists some of the reasons why certiorari may be granted, among them being: "(a) When a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, *or sanctioned such a departure by a lower court*, as to call for an exercise of this Court's power of supervision." (Emphasis added.)

That statement applies to the present case, and the departure is reason enough to grant certiorari. Yet the problem here is deeper and more intense than this general statement conveys. What is at stake here goes to the heart of the role of the judiciary in a democratic society.

It is now settled beyond question (if there ever had been a *bona fide* question) that capital punishment does not violate the Federal Constitution. *Gregg* v. *Georgia*, 428 U. S. 153 (1976). The people of Arizona therefore have the indisputable constitutional right to decide for themselves the state law question of whether murder will be punishable by death. See U. S. Const. Amdt. 10. The people of each of the other states have the same right, to be exercised through the democratic process.

In reality, though, whether a state or district does or does not have capital punishment is now determined as much by the composition of the local federal bench as it is by the democratic process. If a district court can grant a stay of execution and then sit on the case forever, whether intentionally or negligently, capital punishment is abolished as effectively as if it were repealed by the legislature. Indeed, it is more completely abolished, for while legislators can be voted out, federal judges cannot. See *McGautha* v. *California*, 402 U. S. 183, 226 (1971) (Black, J., concurring).

In the absence of appellate control, this judicial sit-down strike will result in pockets across the country where *Gregg* is effectively overruled by district courts. One state

or district will have capital punishment in fact, while the next will have it in name only.

The law should not vary radically from one district to the next because of the composition of the district bench. That is precisely why we have a Supreme Court, to establish a reasonable uniformity in the law. The Federalist No. 22, p. 150 (C. Rossiter ed. 1961). Usually, that uniformity is obtained by settling questions of substantive and procedural law. Occasionally, however, it must be obtained by "exercise of this Court's power of supervision." Supreme Court Rule 10.1(a).

This is one of those occasions.

CONCLUSION

The petition for writ of certiorari should be granted.

October, 1993

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

No. 93-406

Supreme Court, U.S.
FILED
OCT 8 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ARIZONA ATTORNEY GENERAL,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

Respondent.

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, JIMMY ALAN ARNETT,

Real Parties In Interest.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, COLORADO, DELAWARE, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DANIEL E. LUNGREN
Attorney General of California
GEORGE WILLIAMSON
Chief Assistant Attorney General
DANE R. GILLETTE
Deputy Attorney General
MARK L. KROTOSKI
*Special Assistant Attorney General
1515 K Street, Suite 603
Sacramento, CA 95814
Telephone: (916) 324-5497
Attorneys for Amici
*Counsel of Record

October 8, 1993

[additional counsel on inside cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225 6964
OR CALL COLLECT (402) 342 2831

James H. Evans
Attorney General of
Alabama
Alabama State House
11 South Union Street
Montgomery, AL 36130

Gale A. Norton
Attorney General of
Colorado
Department of Law
1525 Sherman Street
Denver, CO 80203

Charles M. Oberly, III
Attorney General of
Delaware
8th Floor
820 North French Street
Wilmington, DE 19801

Larry EchoHawk
Attorney General of Idaho
State House
Room 207
Boise, ID 83720-1000

Robert T. Stephan
Attorney General of Kansas
Judicial Center
Second Floor
Topeka, KS 66612-1597

Chris Gorman
Attorney General of
Kentucky
State Capitol
Frankfort, KY 40601

Richard P. Ieyoub
Attorney General of
Louisiana
Department of Justice
Criminal Division
P.O. Box 94095
Baton Rouge, LA
70804-9095

Mike Moore
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205

Joseph P. Mazurek
Attorney General of
Montana
Justice Building
215 North Sanders
Helena, MT 59620

Don Stenberg
Attorney General of
Nebraska
2115 State Capitol
Lincoln, NE 68509

Frankie Sue Del Papa
Attorney General of
Nevada
Capitol Complex
Carson City, NV 89710

Jeffrey Howard
Attorney General of
New Hampshire
25 Capitol Street
Concord, NH 03301-6397

Fred De Vesa, Acting
Attorney General of
New Jersey
Richard J. Hughes Justice
Complex
25 Market Street
Trenton, NJ 08625-0086

Tom Udall
Attorney General of
New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Theodore R. Kulongoski
Attorney General of
Oregon
100 Justice Building
Salem, OR 97310

Ernest D. Preate, Jr.
Attorney General of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

T. Travis Medlock
Attorney General of
South Carolina
Rembert C. Dennis Office
Building
P.O. Box 11549
Columbia, SC 29211

Mark W. Barnett
Attorney General of
South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

Charles W. Burson
Attorney General of
Tennessee
450 James Robertson
Parkway
Nashville, TN 37243-0493

Jan Graham
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

Joseph B. Meyer
Attorney General of
Wyoming
123 Capitol Building
Cheyenne, WY 82002

QUESTION PRESENTED

Whether this Court should exercise its authority to define "prompt," within the meaning of *In re Blodgett*, 503 U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (per curiam), in order to furnish guidance for the enforcement of this Court's mandate that the lower federal courts "take all steps necessary to ensure a prompt resolution" of capital habeas cases.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF *AMICI* 1

STATEMENT OF FACTS AND PROCEEDINGS 3

SUMMARY OF ARGUMENT 3

REASONS THE WRIT SHOULD ISSUE 4

I. Lack of An Adequate Enforcement Mechanism for the *Blodgett* "Duty" Severely Prejudices Vital State Interests 4

II. The Problem of Obtaining Final Judicial Resolution in Many Capital Habeas Cases is a National One 7

III. This Case Furnishes An Opportunity for the Court to Provide Needed Guidance Concerning the Application of the *Blodgett* Duty 13

A. Judicial Authority 13

B. Other Judicial Analogs: Defining "Prompt" Resolution and the Necessity of Establishing Reasonable "Outer Limits" 16

C. Issue Requires Resolution 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anderson v. Grammer, No. CV-84-L-741 10

Barefoot v. Estelle, 463 U.S. 880 (1983) 7

Browder v. Director, Department of Corrections of Illinois, 434 U.S. 257 (1978) 7

Brown v. Board of Education, 349 U.S. 294 (1955) 18

Chandler v. Florida, 449 U.S. 560 (1981) 14

Coleman v. Thompson, 501 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) 5

County of Riverside v. McLaughlin, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) 16, 17, 18

Cupp v. Naughten, 414 U.S. 141 (1973) 14

Delo v. Stokes, 495 U.S. 320 (1990) 5

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 14

Fay v. Noia, 372 U.S. 391 (1963) 13

Francis v. Henderson, 425 U.S. 536 (1976) 13

Gerstein v. Pugh, 420 U.S. 103 (1975) 12, 16, 17

Gomez & Vasquez v. U.S. District Court for the Northern District of California, 503 U.S. ___, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) (per curiam) 13

Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964) 18

Griffin v. Delo, 961 F.2d 793 (8th Cir.) (per curiam), *cert. denied*, 113 S.Ct. 296 (1992) 10

Groseclose v. Dutton, No. 3:89-0662 (M.D. Tenn.) 8

TABLE OF AUTHORITIES – Continued

Page

Groseclose v. Tennessee, 454 U.S. 882 (1981) 8

Hilton v. Braunskill, 481 U.S. 770 (1987) 7

Hochstein v. Grammer, No. CV-84-L-755 10

Hovey v. Vasquez, No. C-89-1430-MHP 9

In re Blodgett, 503 U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (per curiam) ..... *passim*

In re Michael Dutton, No. 92-6165 (6th Cir.) 9

Johnson v. Rogers, 917 F.2d 1283 (10th Cir. 1990) ..10, 15

Kerr v. U.S. District Court for the Northern District of California, 426 U.S. 394 (1976) 11

Mackey v. United States, 401 U.S 667 (1971) 5, 6

McClellan v. Young, 421 F.2d 690 (6th Cir. 1970) (per curiam) 15

McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) 5, 6

Moore v. Ogilvie, 394 U.S. 814, 816 (1969) 12

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 12

Rickman v. Dutton, No. 3:85-0256 (M.D. Tenn.) 8

Rickman v. Tennessee, 454 U.S. 882 (1981) 8

Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) 15

Rose v. Lundy, 455 U.S. 509 (1982) 5

Rust v. Clarke, 960 F.2d 72 (8th Cir. 1992) (per curiam) 10, 14

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 6

Smith v. Phillips, 455 U.S. 209 (1982) 14

TABLE OF AUTHORITIES – Continued

Page

Spann v. Martin, 963 F.2d 663 (4th Cir. 1992) 6, 10

Stone v. Powell, 428 U.S. 465 (1976).....5, 6

Teague v. Lane, 489 U.S. 288 (1989) 5

Thomas v. Arn, 474 U.S. 140 (1985) 14

United States v. Hastings, 461 U.S. 499 (1983) 14

Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978)..... 15

Withrow v. Williams, 113 S.Ct. 1745, ___, 123 L.Ed.2d 407 (1993)..... 13

STATE CASES:

People v. Hovey, 44 Cal.3d 543 (Cal.), *cert. denied*, 488 U.S. 871 (1988) 9

State v. Anderson, 296 N.W.2d 440 (Neb. 1980), *cert. denied*, 450 U.S. 1025 (1981)..... 10

State v. Groseclose, 615 S.W.2d 142 (Tenn.), *cert. denied*, 454 U.S. 882 (1981)..... 8

STATUTES

28 United States Code

§ 1651(a) 15

§ 2241(a) 13

§ 2243..... 13

TABLE OF AUTHORITIES – Continued

Page

COURT RULES

Rules of the Supreme Court, rule 37.5 2

OTHER AUTHORITIES

H. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970) 5, 6

L. Powell, *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035 (1989) 6

P. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963) 6

No. 93-406

In The

Supreme Court of the United States

October Term, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ARIZONA ATTORNEY GENERAL,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

Respondent.

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, JIMMY ALAN ARNETT,

Real Parties In Interest.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, COLORADO, DELAWARE, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

This case presents important questions concerning the fair and timely enforcement of presumptively final and valid state court judgments. Once the direct review

process has concluded – following conviction and sentencing after the state court trial, a state appeal, and request for direct review to this Court – the States have an interest in prompt resolution of issues raised on federal *collateral* review, consistent with a full and fair consideration of the habeas petition. *Amici* are States who have concerns about obtaining finality, the enforcement of their state laws, and the orderly and proper administration of their criminal justice systems. Accordingly, *amici* have an interest in the clarification of what constitutes a "prompt" resolution of federal habeas cases.

Further, since the States must bear most of the costs of federal habeas review, *amici* have an interest in curtailing the "severe prejudice" which results when a federal court enters a stay and fails to resolve the case in a prompt manner. This includes an inability to enforce state criminal laws and an undermining of public confidence in our criminal justice system resulting from the failure to attain finality. Additionally, the deterrent effect of capital punishment is reduced when the lower federal courts fail to resolve habeas cases promptly. Unless this Court provides needed guidelines, *amici* States have no adequate means to request a prompt resolution of those habeas cases pending in federal court for a substantial period.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

STATEMENT OF FACTS AND PROCEEDINGS

On July 1, 1993, Arizona filed a petition for writ of mandamus with the U.S. Court of Appeals for the Ninth Circuit requesting that the U.S. District Court of Arizona be compelled to resolve five capital habeas corpus cases which had been pending for several years since the first habeas petition had been filed and in which stays of execution had been issued. On July 21, 1993, the Ninth Circuit summarily denied the petition for writ of mandamus in an unpublished ruling. *See* App. to Pet. for Cert., at B-1. Arizona now petitions for certiorari.

SUMMARY OF ARGUMENT

The central issue presented is whether this Court will exercise its authority to establish meaningful guidelines to define "prompt" within the meaning of *Blodgett* so that the *Blodgett* duty may be effectively enforced. The problem of obtaining final judicial resolution in many capital cases is a national one. Unless the Court clarifies the *Blodgett* duty, States will have no means to request "prompt" resolution of those capital habeas cases which have been languishing in federal court. Without time limits (or some other vehicle for the State to urge resolution of long-pending federal habeas petitions), the *Blodgett* duty will remain a hollow one. If the United States Supreme Court does not resolve the issue presented in this case, Arizona has no other avenue for relief to enforce its state court judgments.

REASONS THE WRIT SHOULD ISSUE

I. Lack of An Adequate Enforcement Mechanism for the *Blodgett* "Duty" Severely Prejudices Vital State Interests

Many capital habeas cases are resolved in a fair and timely manner in federal court. However, in an unacceptable number of cases, an indefinite federal court stay is imposed and the federal court fails to resolve the matter promptly. In many of these cases, the States are left without *any* effective means of enforcing presumptively final and valid state court capital judgments. The petition at bar concerns this class of cases.

In *In re Blodgett*, 503 U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (per curiam), this Court considered a petition for a writ of mandamus in a case where the Ninth Circuit had granted an indefinite stay of execution and delayed resolution of the case, which had already been argued and submitted, for more than a year. This Court noted that non-resolution of the case and the two-and-a-half year stay of execution "severe[ly] prejudice[d]" the State's sovereign authority to enforce its criminal law. 112 S.Ct. at 676. These circumstances compelled adoption of the *Blodgett* "duty":

> The delay in this case demonstrates the necessity for the rule that we now make explicit. In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant *duty to take all steps necessary to ensure a prompt resolution of the matter*, consistent with its duty to give full and fair

> consideration to all of the issues presented in the case.

Blodgett, 112 S.Ct. at 676 (emphasis added).[1]

As this Court has accurately observed, "*most of the price* paid for federal review of state prisoner claims is *paid by the States.*" *Coleman v. Thompson*, 501 U.S. ___, 111 S.Ct. 2546, 2559, 115 L.Ed.2d 640 (1991) (emphasis added). In cases of substantial delay, the "severe prejudice," sustained by the State, and expressly recognized by the *Blodgett* Court, entails several well-recognized costs.

For example, during the pendency of a federal court stay and delay in resolving the case, the sovereign power of the States to enforce substantive criminal laws is denied and frustrated.[2] In addition, there can be no justice until finality is attained.[3] Public confidence in the

---

[1] This was not the first time that members of this Court noted the necessity for lower federal courts to develop procedures to handle federal capital cases in a priority or prompt manner. *See Delo v. Stokes*, 495 U.S. 320, 323 (1990) (Kennedy, J., concurring).

[2] *See, e.g., McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 1469, 113 L.Ed.2d 517, 543 (1991) (discussing intrusion into state sovereignty interests); *Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982) (noting comity interest); *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976).

[3] *See McCleskey*, 111 S.Ct. at 1468 ("Neither innocence nor just punishment can be vindicated until the final judgment is known."); *see also Teague*, 489 U.S. at 309 (plurality opinion); *Stone*, 428 U.S. at 491 n.31; *Mackey v. United States*, 401 U.S 667, 683, 690-91 (1971) (Harlan, J., concurring and dissenting); H. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 147 (1970) [hereinafter H.

ability of our criminal justice system to resolve primary criminal justice disputes is also undermined.[4] Finally, if a second state trial is required, its outcome and accuracy may turn on the reliability and availability of any remaining evidence.[5]

In considering the issue of federal court delay in habeas corpus proceedings, the nature and function of collateral review must also be taken into account. Federal

---

Friendly, *Is Innocence Irrelevant?*]; P. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 450-51 (1963).

[4] *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 275 (1973) (Powell, J., concurring) ("It is this paradox of [our habeas corpus] system, which so often seems to subordinate substance to form, that increasingly provokes criticism and lack of confidence."); *see also Stone*, 428 U.S. at 491 (noting concern over "generating disrespect for the law and administration of justice"); *Spann v. Martin*, 963 F.2d 663, 673 (4th Cir. 1992) ("The public also has a vital interest in the fair and prompt conclusion of habeas corpus petitions in the federal courts, particularly when they involve a serious crime prosecuted by one of the states."); L. Powell, *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035, 1035 (1989) (noting the "years of delay between sentencing and execution . . . undermine[] the deterrent effect of capital punishment and reduce[] public confidence in the criminal justice system").

[5] *See, e.g., Mackey*, 401 U.S. at 691 (Harlan, J., concurring and dissenting) (noting the "very act of trying *stale facts* may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first") (emphasis added); *see also McCleskey*, 111 S.Ct. at 1468; H. Friendly, *Is Innocence Irrelevant?*, 38 U. Chi. L. Rev. at 147.

habeas review is a civil proceeding,[6] which follows a presumptively final and valid state court criminal conviction and sentence. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). As this Court has emphasized, "The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is *secondary* and *limited*. Federal courts are not forums in which to *relitigate* state trials." *Id.* (emphasis added). This case therefore concerns the duty of federal courts to review fairly constitutional challenges to state court judgments without prejudicing important state interests.

II. The Problem of Obtaining Final Judicial Resolution in Many Capital Habeas Cases is a National One

The States confront the problem of substantial delay in a number of lower federal courts around the country. In many of these cases, the two-and-a-half year stay, which prompted the *Blodgett* duty in the first instance, has been exceeded.

In its petition, the State of Arizona has already noted the capital cases which have been stayed and pending in district court for a substantial period. A review of a few pending capital cases illustrates the national problem. Some of these cases involve the most gruesome murders in our society:

---

[6] *Hilton v. Braunskill*, 481 U.S. 770, 776 & n.5 (1987) (noting civil nature of habeas proceedings); *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257, 257 (1978).

- William Edward Groseclose was convicted and sentenced to death for his role in the 1977 contract murder of his wife, called "one of the most atrocious and inhuman conceivable" by the Supreme Court of Tennessee. *State v. Groseclose*, 615 S.W.2d 142, 145 (Tenn.), *cert. denied*, 454 U.S. 882 (1981). The victim was strangled into unconsciousness, stabbed in the back and placed in her automobile trunk. Despite cries for help, she was left in the trunk, ultimately dying from excessive heat. *Id.* at 145-46. Groseclose's conviction became final in 1981, *Groseclose v. Tennessee*, 454 U.S. 882 (1981), and he filed a habeas corpus petition in the U.S. District Court for the Middle District of Tennessee, which issued a stay in 1989. The State of Tennessee filed two dispositive motions in 1990, which remain undecided despite requests for rulings. *Groseclose v. Dutton*, No. 3:89-0662 (M.D. Tenn.).

- Ronald Eugene Rickman, co-defendant in *Groseclose*, was convicted and sentenced to death as the contract killer of Groseclose's wife. *See State v. Groseclose*, 615 S.W.2d 142 (Tenn.), *cert. denied*, 454 U.S. 882 (1981). His conviction became final in 1981. *Rickman v. Tennessee*, 454 U.S. 882 (1981). He filed a habeas corpus petition in the U.S. District Court for the Middle District of Tennessee, which issued a stay in 1985. After denying the State of Tennessee's motion to transfer the case, the court took no further action for three years. This prompted several motions from the State to ascertain the status of the case in 1988 to 1989. *Rickman v. Dutton*, No.

3:85-0256 (M.D. Tenn.). The State of Tennessee filed a dispositive motion in 1990, which remained undecided when the State filed a petition for writ of mandamus in the Sixth Circuit in September, 1992. In response to the mandamus petition, the district court set an evidentiary hearing for six days later. The evidentiary hearing was continued indefinitely at Rickman's request. The Sixth Circuit has not taken final action on the mandamus petition, despite the State's motion to expedite filed five months ago. *In re Michael Dutton*, No. 92-6165 (6th Cir.).

■ Richard Hovey was convicted and sentenced to death for the 1978 kidnapping and murder of an eight year old girl. The victim was beaten and stabbed. The evidence demonstrated that Hovey killed the child because she had seen his face and he was afraid she could identify him. Subsequent to the murder, Hovey kidnapped and sexually assaulted a nine year old girl. The judgment was affirmed by the California Supreme Court in 1988. *People v. Hovey*, 44 Cal.3d 543 (Cal.), *cert. denied*, 488 U.S. 871 (1988). A petition for writ of habeas corpus was filed in the U.S. District Court for the Northern District of California on April 26, 1989; the federal court issued a stay of execution on April 27, 1989. *Hovey v. Vasquez*, No. C-89-1430-MHP. The State filed a motion for summary judgment on January 30, 1991. An opposition was filed in May, 1991. Despite requests from the State to schedule a hearing, the district court has not acted on the summary judgment motion.

- Two Nebraska cases have been pending for nearly nine years on federal habeas review. Peter Hochstein and C. Michael Anderson were convicted and sentenced to death for a 1975 contract murder of Anderson's employer. *State v. Anderson*, 296 N.W.2d 440 (Neb. 1980), *cert. denied*, 450 U.S. 1025 (1981). Federal habeas petitions and federal court stays were issued in 1984. *Anderson v. Grammer*, No. CV-84-L-741; *Hochstein v. Grammer*, No. CV-84-L-755. Over the State of Nebraska's objection, on January 4, 1993, the federal court allowed the filing of a third amended petition.

The problem of federal court delay has also been chronicled in some published cases where appellate courts have found it necessary to order that federal habeas capital cases be expedited. These reviewing courts have felt obliged to impose specific time limits for resolving the case,[7] or at least require "prompt" resolution.[8] Significantly, until such action occurs by a

---

[7] *See Rust v. Clarke*, 960 F.2d 72, 73 (8th Cir. 1992) (per curiam) (in capital habeas case "pending for almost four years," "remand[ing] the case to the district court to pass on the remaining claims within ninety days" and noting capital habeas cases should generally "be briefed within six months of filing and decided within a reasonable time thereafter"); *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990) (in habeas case pending "more than fourteen months without resolution," ordering case to be heard and decided "within sixty days"); *see also Griffin v. Delo*, 961 F.2d 793, 794 (8th Cir.) (per curiam) (remanding habeas case to district court to "consider new claims, defenses and certify its final consideration" of case "within 180 days"), *cert. denied*, 113 S.Ct. 296 (1992).

[8] *Spann*, 963 F.2d at 673 (in capital habeas case "pending for more than five years" before the district court, remanding "for a

reviewing court, enforcement of the state court conviction and sentence are held in abeyance pending resolution by the federal court.

However, in many other cases, as here, State requests for resolution of the case are denied by the appellate court in an unpublished, summary ruling.[9] *See* App. to Pet. for Cert., at B-1. This action furnishes a judicial "stamp of approval" on the substantial delay of the lower court in resolving the case, contrary to the dictates of *Blodgett*. In these cases, the States lack any effective means to enforce their state court judgments.

Amici States recognize the extraordinary nature of mandamus relief and that it is an accepted prerequisite that a petition for writ of mandamus only be filed when the party has no other adequate means to obtain relief.[10] That step has been pursued here by the State of Arizona. Notwithstanding the clear directive of the *Blodgett* duty,

---

prompt consideration" of the magistrate judge's recommendations).

[9] Given the extraordinary nature of mandamus relief, *see* note 10, *infra*, many federal courts appear reluctant to publish decisions compelling action by a lower court. For this reason, an illusion may be created that there is no split in authority by the absence of published orders.

[10] *See, e.g., Kerr v. U.S. District Court for the Northern District of California*, 426 U.S. 394, 402 (1976) ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.").

As a predicate for relief in a petition for writ of mandamus, the *Blodgett* Court also required that the State seek affirmative relief in the court where the case is pending before requesting the involvement of a reviewing court. *See Blodgett*, 112 S.Ct. at 676-77.

the instant matter – as well as other cases from around the country – makes clear the necessity to clarify and establish a meaningful enforcement mechanism so that the *Blodgett* duty will not become ineffectual. Without such guidance from this Court, States will be left with no other means of prompting resolution of cases pending on federal collateral review and enforcing presumptively valid and final state court judgments.[11]

---

[11] In the event that respondent and the real parties in interest may attempt to argue that this case has become mooted, this Court should still exercise jurisdiction under the "capable of repetition, yet evading review" doctrine. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). This exception has been applied, as it should here, where "[t]he need for . . . resolution . . . reflects a continuing controversy in the federal-state area" under this Court's cases. *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

Moreover, the State of Arizona will continue to be "severely prejudiced" from the considerable delay encountered in other federal habeas cases. For example, the petitioner's brief lists other pending cases which have been languishing in federal court for a substantial period. *See* App. to Pet. for Cert., at A-33. It is therefore likely that the same action may arise again between the State of Arizona and respondent. As noted in the text, other States presently confront similar circumstances.

Finally, lower federal courts may attempt to evade the review of this Court by resolving the federal habeas case only *after* the State pursues its final remedy: a petition for certiorari review by this Court. *Cf. Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546 (1976) ("The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired. . . . "). For these reasons, it is also appropriate for this Court to resolve this problem on the merits since it is capable of repetition, yet evading review.

III. This Case Furnishes An Opportunity for the Court to Provide Needed Guidance Concerning the Application of the *Blodgett* Duty

A. Judicial Authority

Before considering a *Blodgett* enforcement mechanism, it is useful to review the authority of this Court to adopt specific guidelines to promote the *Blodgett* duty. As will be seen, there are at least three sources of authority available for this Court to promulgate an effective *Blodgett* enforcement mechanism.

First, at least one case has suggested that the *Blodgett* duty is grounded on principles of equity, as is much of this Court's habeas jurisprudence.[12] It therefore follows

---

[12] *See Gomez & Vasquez v. U.S. District Court for the Northern District of California*, 503 U.S. ___, 112 S.Ct. 1652, 1653, 118 L.Ed.2d 293 (1992) (per curiam) ("Equity must take into consideration the State's strong interest in proceeding with its judgment and [the habeas petitioner's] obvious attempt at manipulation.") (citing, *inter alia*, *Blodgett*).

The habeas statute provides for the exercise of equitable discretion. *See* 28 U.S.C. § 2241(a) ("Writs of habeas corpus *may* be granted. . . . ") (emphasis added); § 2243 ("The court shall . . . dispose of the [application for a writ of habeas corpus] *as law and justice require.*") (emphasis added). Many of this Court's cases have recognized the equitable nature of habeas relief. *See, e.g., Francis v. Henderson*, 425 U.S. 536, 539 (1976) ("This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forgo the exercise of its habeas corpus power."); *Fay v. Noia*, 372 U.S. 391, 438 (1963) ("[H]abeas corpus has traditionally been regarded as governed by equitable principles."); *see generally Withrow v. Williams*, 113 S.Ct. 1745, 1766-67, 123 L.Ed.2d 407 (1993) (Scalia, J., dissenting) (discussing historic tradition of equitable discretion under the writ).

that the equity basis to establish the *Blodgett* duty in the first instance supplies the authority for the Court to make that duty enforceable. It would otherwise be untenable to suggest that the Court had authority to establish the *Blodgett* duty but lacked the means to ensure the duty's proper application.

Second, while federal courts clearly lack supervisory authority over *state* judicial proceedings,[13] this Court has supervisory authority concerning the administration of justice in the *federal* courts.[14] This supervisory authority has been relied upon to expedite resolution of capital habeas cases.[15] The exercise of this authority is particularly appropriate for such cases which regularly involve the imposition of an indefinite stay of execution by the federal court. Plainly, attendant with the exercise of this

---

[13] *Smith v. Phillips*, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."); *Chandler v. Florida*, 449 U.S. 560, 570, 582-83 (1981); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973).

[14] *See, e.g., United States v. Hastings*, 461 U.S. 499, 505 (1983) ("[I]n the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress."); *see also Thomas v. Arn*, 474 U.S. 140, 146-48 (1985) (noting supervisory authority of courts of appeals to promulgate procedural rules regarding the management of litigation).

[15] *See, e.g., Rust*, 960 F.2d at 73 (relying on "general supervisory authority to make certain that this case be expedited and not delayed any further" and remanding "to the district court to pass on the remaining claims within ninety days").

great authority is the responsibility to resolve the case fairly and promptly.

Third, the All Writs Act provides that "The Supreme Court . . . may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Among other things, the writ may be utilized "to compel [an inferior court] to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (quoted in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978) (plurality opinion)). Petitions for writ of mandamus have been granted in habeas corpus cases in which resolution of the case had been pending for a substantial period.[16] In fact, the *Blodgett* duty arose in a case where the State of Washington directly petitioned this Court for a writ of mandamus. *See Blodgett*, 112 S.Ct. at 677 (denying petition without prejudice). In the instant matter, the State of Arizona's petition for writ of mandamus has been summarily denied by the court of appeals.

In sum, there is no dispute over the Court's authority to enforce the *Blodgett* duty. The only question is whether

---

[16] *See, e.g., Johnson*, 917 F.2d at 1285 (granting petition, holding "that the fourteen-month delay in this case for no reason other than docket congestion is impermissible," and ordering case to be heard and decided "within sixty days"); *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970) (per curiam) (issuing writ of mandamus and ordering district court to act on habeas petition "not later than ten days after receipt of a copy of this Order"); *accord Will*, 437 U.S. at 666-67 ("Where a district court obstinately refuses to adjudicate a matter properly before it, a court of appeals may issue the writ. . . . ").

and how this authority should be exercised. *Amici* States respectfully submit that they will be without *any* effective remedy until this Court does so. As this case demonstrates, all other possible remedies have been pursued by the State. Only this Court can relieve the severe prejudice caused by the inability of the U.S. District Court to resolve the habeas cases at bar.

B. Other Judicial Analogs: Defining "Prompt" Resolution and the Necessity of Establishing Reasonable "Outer Limits"

Central to the *Blodgett* rule is the federal court "duty to take all steps necessary to ensure a *prompt* resolution of the matter." *Blodgett*, 112 S.Ct. at 676 (emphasis added). In other contexts, this Court has adopted time limits or specific standards to define the meaning of "prompt" to guide the lower courts and parties.

For example, in *County of Riverside v. McLaughlin*, this Court defined "prompt" within the meaning of its holding in *Gerstein v. Pugh*, 420 U.S. 103 (1975), that "the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest." *McLaughlin*, 111 S.Ct. 1661, 1665, 114 L.Ed.2d 49 (1991). As the *McLaughlin* Court recognized, "Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds." *Id.* at 1670.

In assessing the competing interests at stake, the Court defined *Gerstein* promptness under a general 48-hour rule.[17] This rule established a presumption of reasonableness to insulate probable cause determinations from "system challenges," while affording "a substantial degree of flexibility." *Id.* at 1670. When a probable cause determination is not held within 48 hours, the burden shifts to the government to demonstrate that the detention was "reasonable" under the circumstances. *McLaughlin*, 111 S.Ct. at 1665.

There are several analogies between the matter at bar and *McLaughlin*. In fact, a more compelling case can arguably be made to establish time limits to make the *Blodgett* duty meaningful, since it arises under a statutory, not constitutional, scheme. Similar to federal habeas corpus proceedings, the *Gerstein* rule is predicated on "important competing interests," requiring "a 'practical compromise' between the rights of individuals and the realities of law enforcement."[18] In adopting the *Gerstein* rule, this Court considered the "burden" of *Gerstein* proceedings on state criminal justice systems, giving "proper

---

[17] In contrast with the 48-hour rule of the majority, one *McLaughlin* dissent argued for a 24-hour rule. *See McLaughlin*, 111 S.Ct. at 1676 (Scalia, J., dissenting). Both the majority and dissent therefore recognized the necessity of providing guidance by establishing outer boundaries on *Gerstein* "promptness."

[18] *McLaughlin*, 111 S.Ct. at 1668; *see also id.* at 1669 ("*Gerstein* struck a balance between competing interests; a proper understanding of the decision is possible only if one takes into account both sides of the equation."); *id.* at 1670 ("*Gerstein* clearly contemplated a reasonable accommodation between legitimate competing concerns.").

deference to the demands of federalism." *Id.* at 1668. Further, this Court recognized that "it is not enough to say that probable cause determinations must be 'prompt' " and that the "vague" standard of promptness in *Gerstein* "simply has not provided sufficient guidance." *Id.* at 1669.

Perhaps Justice Scalia best summed up the issue presented by this case when he noted, in the *Gerstein* Fourth Amendment context, "Any determinant of *'reasonable promptness'* . . . must be restricted by *some outer time limit*, or else the promptness guarantee would be worthless." *McLaughlin*, 111 S.Ct. at 1675 (Scalia, J., dissenting) (emphasis added). Unless and until the Court establishes outer limits on the meaning of "prompt" under the *Blodgett* duty, the *Blodgett* rule of this Court will be rendered meaningless by those lower federal courts which decide not to comply with its dictates.[19]

C. Issue Requires Resolution

The facts of the case at bar – as well as other cases from around the country – demonstrate the necessity for the Court to define "prompt" under the *Blodgett* duty. In hearing the case on the merits, the Court will have an

---

[19] Other historical episodes should prove instructive as the Court fashions a "promptness" standard under *Blodgett*. For example, this Court commanded that school districts desegregate "with all deliberate speed," *Brown v. Board of Education*, 349 U.S. 294, 301 (1955), a directive which ultimately required further intervention and clarification by this Court. *See Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, 234 (1964) ("The time for mere 'deliberate speed' has run out.").

opportunity to consider various potential means to enforce the *Blodgett* duty. The State of Arizona has recommended one possibility involving presumptive time limits. Under this proposal, if resolution of the case did not occur within the established time limit, a prima facie case would be made that the *Blodgett* mandate was not satisfied. Upon this prima facie showing, an order to show cause would be issued to the lower court. Other options for enforcing the *Blodgett* duty may also be explored if the Court considers this case on the merits.

One thing is clear. Without action by this Court, States confronting similar circumstances like Arizona have no other avenue for relief. In these cases, the costs of federal collateral review continue to be unfairly borne by the States.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for a writ of certiorari.

Dated: October 8, 1993

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

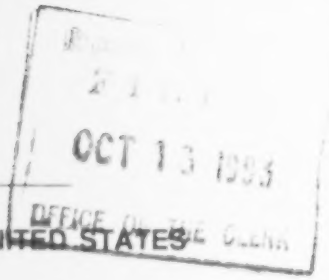
DANE R. GILLETTE
Deputy Attorney General

*MARK L. KROTOSKI
Special Assistant Attorney General

1515 K Street, Suite 603
Sacramento, California 95814
(916) 324-5497

Attorneys for Amici
*Counsel of Record

No. 93-406



IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL LEWIS, DIR. / RIZONA DEP'T. OF COR.,
GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

vs.

U. S. DISTRICT COURT, DIST. OF ARIZONA,
RESPONDENT.

M. E. CORRELL, J. R. VILAFUERTE, J. A. ARNETT,
REAL PARTIES OF INTEREST

PETITION FOR WRIT OF CERTIORARI
TO THE U. S. COURT OF APPEALS, 9th CIRCUIT

AMICUS CURIAE
STATE OF MISSOURI

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Counsel of Record

Post Office Box 899
Jefferson City, MO 65102
(314) 751-3321

Amicus Curiae

QUESTION PRESENTED

I.

Did the Court of Appeals abuse its discretion by refusing to issue a writ of mandamus to supervise the orderly administration of the Arizona District Court when the evidence clearly demonstrated that the District Court had shown a constant refusal to rule promptly on its pending capital habeas corpus cases.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Interest of *Amicus Curiae* 1

Summary of the Argument 2

Argument 3

The United States Court of Appeals for the Ninth Circuit abused its discretion by refusing to issue a writ of mandamus directing the District Court of Arizona to rule promptly on its pending capital habeas corpus cases

Conclusion 18

TABLE OF AUTHORITIES

Pages

Cases

Amrine v. Delo, No. 90-0940-CV-W-2
(W.D. Mo.) 9

Anderson v. Hopkins, No. CV84-L-741
(D. Neb.) 6

Blair v. Armontrout, 643 F. Supp. 785
(W.D. Mo. 1986), *aff'd*, 916 F.2d 1310
(8th Cir. 1990), *cert. denied*,
112 S.Ct. 89 (1991) 11

Boliek v. Delo, No. 89-4076-CV-C-5
(W.D. Mo.) 8

Byrd v. Armontrout, 686 F. Supp. 743
(E.D. Mo. 1988), *aff'd*, 880 F.2d 1
(8th Cir. 1989), *cert. denied*,
494 U.S. 1019 (1990) 11

Clemmons v. Delo, No. 90-0943-CV-W-6
(W.D. Mo.) 9

Davis v. State, No. CR 92-1385
(Ark. Sup. Ct. Oct. 4, 1993) 15

Delo v. Griffin,
113 S.Ct. 296 (1992) 12-13, 16

Driscoll v. Delo, No. 89-1894C(6)
(E.D. Mo.) 8

Ford v. Lockhart, No. PB-C-82-0431
(E.D. Ark.) 4, 6, 15

Gacy v. Welborn, 994 F.2d 305
(7th Cir. 1993) 4

Gardner v. Lockhart, No. PB-C-89-99
(E.D. Ark.) 6

Griffin v. Armontrout, 961 F.2d 793
(8th Cir.), *cert. denied*,
113 S.Ct. 296 (1992) 12-13, 16

Griffin v. Delo, No. 90-2377
(8th Cir. Sept. 9, 1993) 13

Hill v. Lockhart, No. PB-C-82-375
(E.D. Ark.) 4, 6, 13, 15

Hill v. Lockhart, 824 F. Supp. 1327
(E.D. Ark. 1993) 4, 6, 13, 15

Hochstein v. Hopkins, No. CV84-L-755
(D. Neb.) 6

In re A. L. Lockhart, No. 90-1489
(8th Cir. May 24, 1990) 13

In re Paul Delo, No. 92-3468 (8th Cir.
Dec. 11, 1992) 11

Johns v. Delo, No. 88-1196C(2) (E.D. Mo.) 7

Jones v. Delo, No. 89-1891C(8) (E.D. Mo.) 8

Jones v. Delo, No. 90-0939-CV-W-8
(W.D. Mo.) 9

Kilgore v. Delo, No. 89-1892C(2)
(E.D. Mo.) 8

LaRette v. Delo, No. 86-753C(2)
(E.D. Mo.) 7

Lingar v. Delo, No. 89-1954C(4)
(E.D. Mo.) 8

Mallett v. Delo, No. 90-437C(2)
(E.D. Mo.) 8

Mallett v. Delo, No. 92-2023
(8th Cir. Oct. 14, 1992)
(unpublished) 15-16

McDonald v. Delo, No. 89-1282C(4)
(E.D. Mo.) 8

McMillin v. Delo, No. 90-0942-CV-W-1
(W.D. Mo.) 9

Miller v. Lockhart, No. PB-C-81-152
(E.D. Ark.) 4, 6, 13, 14, 14-15

Miller v. Lockhart, 515 F. Supp. 3
(E.D. Ark. 1981) 4, 6, 13, 14, 14-15

Moore v. Clarke, No. CV84-L-754
(D. Neb.) 6

Moore v. Clarke, 904 F.2d 1226
(9th Cir.), *cert. denied*,
112 S.Ct. 1995 (1992) 6

Nave v. Delo, No. 89-0447C(4) (E.D. Mo.) 7

O'Rourke v. State, 300 Ark. 323,
778 S.W.2d 938 (1989) 15

Perry v. Lockhart, No. PB-C-83-275
(E.D. Ark.) 5

Perry v. Lockhart, 871 F.2d 1384
(8th Cir.), *cert. denied*,
493 U.S. 959 (1989) 5

Preston v. Delo, No. 88-0991C(4)
(E.D. Mo.) 7

Pruett v. Lockhart, No. PB-C-88-195
(E.D. Ark.) 5-6

Reeves v. Clarke, No. CV90-L-0311
(D. Neb.) 6

Roberts v. Delo, No. 90-0592C(2)
(E.D. Mo.) 8

Robertson v. State, 298 Ark. 131,
765 S.W.2d 936 (1989) 14, 15

Ruiz v. Lockhart, No. PB-C-89-395
(E.D. Ark.) 5

Rust v. Clarke, 960 F.2d 72
(8th Cir. 1992) 4, 7

Schlup v. Delo, No. 4:92CV00443JCH
(E.D. Mo.) 10

Schneider v. Delo, No. 90-1968C(5)
(E.D. Mo.) 9

Singleton v. Lockhart, No. PB-C-90-323
(E.D. Ark.) 5

Singleton v. Lockhart, 962 F.2d 1315
(8th Cir.), *cert. denied*,
113 S.Ct. 435 (1992) 5

Smith v. Armontrout, 692 F. Supp. 1079
(W.D. Mo. 1988), *aff'd*, 888 F.2d 530
(8th Cir. 1989), *stay denied*,
493 U.S. 1039 (1990) 11

Walls v. Delo, No. 90-0607C(2)
(E.D. Mo.) 8-9

Whitmore v. State, 299 Ark. 55,
771 S.W.2d 266 (1989) 15

Williams v. Clarke, No. CV87-L-134
(D. Neb.) 6

Williams v. Clarke, 823 F. Supp. 1487
(D. Neb) 6-7

Williams v. Delo, No. 91-0230-CV-W-8
(W.D. Mo.) 10

Young v. Delo, No. 90-2053C(6)
(E.D. Mo.) 9-10

Zeitvogel v. Delo, No. 89-0510-CV-W-9
(W.D. Mo.) 7-8

Statutes and Rules

28 U.S.C. § 2254 3

Supreme Court Rule 10.1 2

Secondary Authority

Death Row, U.S.A. 15 (NAACP Legal Defense
& Educational Fund, Inc. Summer 1993) 3

INTEREST OF *AMICUS CURIAE*

Amicus curiae is a state within the territorial jurisdiction of the United States Court of Appeals for the Eighth Circuit and has capital habeas corpus litigation pending before the federal district courts. The States of Arkansas, Missouri and Nebraska have experienced prejudicial delay in the resolution of capital habeas litigation by the district courts. Accurate and expeditious consideration of capital habeas litigation is in the interest of both the death-row prisoner and the *amicus curiae*.

The interests of the State of Missouri are both substantial and continuing.

SUMMARY OF THE ARGUMENT

In the case at bar, Petitioners Lewis and Woods have clearly established good cause for the Court to issue a writ of certiorari under Supreme Court Rule 10.1. Petitioners have shown a significant question, the Arizona District Court's delay in consideration of the capital habeas corpus litigation of Correll, Villafuerte and Arnett, a question that cried for consideration by the United States Court of Appeals for the Ninth Circuit. That court, however, summarily declined to issue a remedial writ of mandamus.

This brief, by *amicus curiae* Missouri will discuss the situations in Arkansas, Missouri and Nebraska, states within the territorial jurisdiction of the United States Court of Appeals for the Eighth Circuit, concerning delay in resolving capital habeas corpus litigation by the district courts. *Amicus curiae* will discuss over thirty capital habeas cases that have been pending in the district courts since before 1991. Supreme Court Rule 10.1. This brief will also discuss efforts by these states to have this problem reviewed and corrected by the court of appeals. That appellate court has attempted to solve the problem in some situations, but when remedies are attempted, the remedies have been ineffective. Finally, *amicus curiae* will discuss why petitioners' proposed solution should be more effective than the *status quo*.

ARGUMENT

The purpose of this brief by *amicus curiae* is twofold. First, *amicus curiae* will describe, systematically, the problem of delay in capital habeas litigation by the district courts within the territorial jurisdiction of, the United States Court of Appeals for the Eighth Circuit. Second, *amicus curiae* will describe piecemeal attempts by the court of appeals to solve the problem, how these efforts have been unsuccessful, and the lesson to be learned in fashioning relief.

The States of Arkansas, Missouri and Nebraska have capital punishment statutes and significant numbers of inmates under sentence of death. Arkansas has about thirty-seven people under sentence of death. Death Row, U.S.A. 15 (NAACP Legal Defense & Educational Fund, Inc. Summer 1993). Missouri has about eighty-four people on its death row. *Id.* at 28. Nebraska has about eleven people on its death row. *Id.* at 29. If these individuals are unsuccessful in vacating their convictions and sentences in state court, 28 U.S.C. § 2254(b), (c) (exhaustion requirement), they will pursue relief in federal court under 28 U.S.C. § 2254. *Amicus curiae* believe that if the federal government extends the privilege of the writ of habeas corpus to death-row inmates, then the federal government should obligate itself to conduct accurate and expeditious consideration of the litigation.

A. Delay in Capital Habeas Litigation in the Eighth Circuit

Amicus curiae will discuss over thirty capital habeas cases that were filed with the district courts before 1991. Some of these cases have been pending for over a decade.

1. Decade-Long Capital Habeas Litigation

The most egregious example of slow resolution of capital cases by district courts in this Circuit is Miller v. Lockhart, No. PB-C-81-152 (E.D. Ark.). In that case, the stay of execution was entered in May, 1981. 515 F. Supp. 3 (E.D. Ark. 1981). Twelve and a half years later the litigation continues under consideration by the district court. In Hill v. Lockhart, No. PB-C-82-375 (E.D. Ark.), the district court required eleven years of contemplation before issuing the writ. 824 F. Supp. 1327 (E.D. Ark. 1993). In Ford v. Lockhart, No. PB-C-82-0431 (E.D. Ark.), the habeas litigation has been pending for eleven years without decision.

These decade-long federal district-court habeas corpus litigations are unfair to the prisoner and unfair to the state. Rust v. Clarke, 960 F.2d 72, 73 (8th Cir. 1992). While the remaining examples of delay in capital habeas corpus litigation that will be discussed by *amicus curiae* are not decade-long, the delays are worthy of repudiation by this Court without distinction between the lengths of the delay.

> We . . . turn directly to the four arguments Gacy has culled from more than one hundred raised at one or another stage of this litigation, now fourteen and one-half years old. Gacy has in this sense already escaped the judgments of execution, for judge and jury cannot decide whether a murderer will die, but only how soon.

Gacy v. Welborn, 994 F.2d 305, 306 (7th Cir. 1993) (emphasis in original). Whether the delay in resolving a capital

habeas case is six months or twelve years is irrelevant in light of the effect such delay has upon the system.

2. Cases Pending for Three to Nine Years

The following discussion of delay in capital cases concerns only those that have been pending in the district courts of Arkansas, Missouri and Nebraska since before January 1, 1991. *Amicus curiae*, for the sake of brevity, will not discuss capital habeas cases that have been filed since then. The Court should not interpret this lack of discussion as condoning two-year delays but condemning three-year delays. All delays in resolving capital habeas litigation should be condemned by this Court.

a. Arkansas

There are five additional examples of delay by the Arkansas district courts. Earl Van Denton and Paul Ruiz filed their petitions for writ of writ of habeas corpus in 1989. Four years later, the litigations continue without resolution. Ruiz v. Lockhart, No. PB-C-89-395 (E.D. Ark.). Charles Singleton's first petition for writ of habeas corpus was denied by the Eighth Circuit. Singleton v. Lockhart, 962 F.2d 1315 (8th Cir.), *cert. denied*, 113 S.Ct. 435 (1992). The second petition has been pending before the district court since 1990. Singleton v. Lockhart, No. PB-C-90-323 (E.D. Ark.). Eugene Perry's first petition for writ of habeas corpus was denied by the court of appeals in 1989. Perry v. Lockhart, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989). The second petition has been pending before the district court since January 17, 1990. Perry v. Lockhart, No. PB-C-83-275 (E.D. Ark.). Marion Pruett filed his first petition for writ of habeas corpus in early 1988. Five years later, the

district court has not decided the litigation. Pruett v. Lockhart, No. PB-C-88-195 (E.D. Ark.). Mark Gardner filed his first petition for writ of habeas corpus early in 1989. Again, after the passage of four years, the district court has not decided this habeas litigation. Gardner v. Lockhart, No. PB-C-89-99 (E.D. Ark.). These five examples from Arkansas, along with the decade-long examples of Miller, Hill and Ford amply demonstrate the problem the State of Arkansas has with its federal district courts.

b. Nebraska

The situation in Nebraska is no better. There are six cases from that state that warrant discussion. Michael Anderson filed his petition for writ of habeas corpus on November 7, 1984. Anderson v. Hopkins, No. CV84-L-741 (D. Neb.). Almost nine years later, the litigation continues before the district court. Likewise, Peter Hochstein also filed his petition for writ of habeas corpus in November, 1984. Hochstein v. Hopkins, No. CV84-L-755 (D. Neb.). That litigation also continues before the district court. The habeas litigation involving Carey Moore is now over, with the district court's grant of relief affirmed. Moore v. Clarke, 904 F.2d 1226 (9th Cir.), *cert. denied*, 112 S.Ct. 1995 (1992). Nonetheless, it is appropriate to point out that the litigation before the district court took almost four years to complete. Moore v. Clarke, No. CV84-L-754 (D. Neb.). Randolph Reeves filed his habeas corpus petition on July 27, 1990. Reeves v. Clarke, No. CV90-L-0311 (D. Neb.). Over three years later, the district court has not decided the petition. Finally, Robert Williams began his federal habeas corpus litigation on March 3, 1987. Williams v. Clarke, No. CV87-L-134 (D. Neb.). Six years later, on March 16, 1993, the district court decided the litigation. Williams v. Clarke, 823

F. Supp. 1487 (D. Neb.). Again, this survey of capital habeas litigation from Nebraska, along with Rust v. Clarke, 960 F.2d at 72, amply shows a pattern of delay by the district court of Nebraska in fulfilling its responsibility to resolve capital habeas litigations.

c. Missouri

Finally, *amicus curiae* will discuss some cases from Missouri. Anthony LaRette filed his petition for writ of habeas corpus on April 11, 1986. Anthony LaRette v. Paul Delo, No. 86-753C(2) (E.D. Mo.). Seven years and a month later, the district court denied the petition. The district-court litigation is not final since the district court has not ruled on the Rule 59(e) motion filed on May 24, 1993.

There are two petitions filed in 1988 that have not been decided. In Elroy Preston v. Paul Delo, No. 88-0991C(4) (E.D. Mo.), the petitioner filed his petition for writ of habeas corpus on January 29, 1988. The district court has not yet decided the litigation. In Stephen Johns v. Paul Delo, No. 88-1196C(2) (E.D. Mo.), Mr. Johns filed his petition for writ of habeas corpus on June 23, 1988. The district court has not yet decided the petition notwithstanding the passage of five years.

Eight initial capital habeas cases were filed in 1989 that require discussion. In Emmett Nave v. Paul Delo, No. 89-0447C(4) (E.D. Mo.), Mr. Nave filed his petition for writ of habeas corpus on March 14, 1989. On June 17, 1993, four years and three months later, the district court issued its order granting relief. Richard Zeitvogel filed his petition for writ of habeas corpus on May 26, 1989. Zeitvogel v. Delo, No. 89-0510-CV-W-9 (W.D. Mo.). Almost four and a half

years later, the district court has not rendered an opinion. Samuel McDonald v. Paul Delo, No. 89-1282C(4) (E.D. Mo.). Four years have passed, but the district court has not decided the case. Marvin Jones, a septuagenarian, filed his petition for writ of habeas corpus on October 6, 1989. Marvin Jones v. Paul Delo, No. 89-1891C(8) (E.D. Mo.). Four years have passed, and the district court has not decided his case. Bruce Kilgore filed his petition for writ of habeas corpus about the same time as Mr. Jones. The district court has not decided that case either. Bruce Kilgore v. Paul Delo, No. 89-1892C(2) (E.D. Mo.). Robert Driscoll also filed his petition for writ of habeas corpus on October 6, 1989, Robert Driscoll v. Paul Delo, No. 89-1894C(6) (E.D. Mo.); however, that case, too, has not been decided. Stanley Lingar filed his petition for writ of habeas corpus a few days later. That case also has not been decided. Stanley Lingar v. Paul Delo, No. 89-1954C(4) (E.D. Mo.). William Boliek filed his petition for writ of habeas corpus on April 13, 1989. William Boliek v. Paul Delo, No. 89-4076-CV-C-5 (W.D. Mo.). Four years and six months later, there is no decision from the United States District Court for the Western District of Missouri.

There are nine capital habeas corpus petitions that were filed in 1990 that have yet to be decided by the district courts. Jerome Mallett began his capital habeas litigation on March 9, 1990, Jerome Mallett v. Paul Delo, No. 90-437C(2) (E.D. Mo.), but it continues unresolved. Roy Roberts filed his petition for writ of habeas corpus on March 30, 1990. Three years and six months later, there is no decision by the district court. Roy Roberts v. Paul Delo, No. 90-0592C(2) (E.D. Mo.). Robert Walls filed his petition for writ of habeas corpus on March 30, 1990, Robert Walls v. Paul Delo,

No. 90-0607C(2) (E.D. Mo.), but the district court has not decided that case yet.

The situation involving William R. Jones is unique. Mr. Jones filed his petition for writ of habeas corpus on October 16, 1990, about three years ago. William R. Jones v. Paul Delo, No. 90-0939-CV-W-8 (W.D. Mo.). The case has not been decided by the district court. On September 9, 1993, during the early morning hours, Williams Jones escaped the custody of the Missouri Department of Corrections. He was eventually subdued in Louisville, Kentucky, later that day. This illustrates a public-safety policy reason in support of accurate and expeditious resolution of capital habeas cases. Public safety will be protected by more expeditious review of capital habeas corpus litigation.

Joseph Amrine initiated his capital habeas corpus litigation on the same day as Mr. Jones. He, too, has received no decision from the federal district court. Fortunately, he has not escaped custody. Joseph Amrine v. Paul Delo, No. 90-0940-CV-W-2 (W.D. Mo.). Richard McMillin also began his capital habeas litigation on October 16, 1990. Richard McMillin v. Paul Delo, No. 90-0942-CV-W-1 (W.D. Mo.). The district court has not decided that litigation. Eric Clemmons also filed his petition for writ of habeas corpus on that day. Eric Clemmons v. Paul Delo, No. 90-0943-CV-W-6 (W.D. Mo.). There is no decision from the district court. A day later, Eric Schneider filed his petition for writ of habeas corpus with the District Court for the Eastern District of Missouri. That district court has not rendered a decision. Eric Schneider v. Paul Delo, No. 90-1968C(5) (E.D. Mo.). Finally, Moses Young filed his petition for writ of habeas corpus on December 7, 1990, and the district court

has not rendered a decision on it. Moses Young v. Paul Delo, No. 90-2053C(6) (E.D. Mo.).

There are eleven unresolved initial petitions for writ of habeas corpus filed by Missouri death-row prisoners in 1991. Likewise, two initial petitions filed in 1992 and two petitions filed in 1993 have not been resolved by the district courts.

3. Delay in Successive Petitions

Some final comments are necessary concerning delay in second petitions for writ of habeas corpus. The delays in Arkansas' successive habeas litigation concerning Singleton and Perry have been discussed earlier. In Doyle Williams v. Paul Delo, No. 91-0230-CV-W-8 (W.D. Mo.), the inmate pursued his second petition for writ of habeas corpus on March 18, 1991. Two and a half years have passed without a decision from the district court. In Lloyd Schlup v. Paul Delo, No. 4:92CV00443JCH (E.D. Mo.), the petitioner filed his successive petition on March 11, 1992. Over sixteen months later, on August 23, 1993, the district court denied relief. The problem of delay by the Missouri district courts is not confined to initial petitions for writ of habeas corpus. This problem also includes second petitions as well.

B. The Remedy

Petitioners request this Court to establish a 120-day time limit for ruling on dispositive motions, a 30-day time limit for ruling on procedural motions, and a 180-day time limit for scheduling an evidentiary hearing (Petition, pp. 16-18). If the district court does not comply with these deadlines, a show-cause order would automatically issue from the

appellate court (Petition, p. 17). Petitioners' proposals have merit and should be an improvement over the piecemeal mandamus litigation currently used.

1. Reasonableness of Proposal

Accurate and expeditious capital habeas litigation is not a fantasy. Some examples illustrate that it can be done.

In Byrd v. Armontrout, the petition for writ of habeas corpus was filed on October 23, 1987. After appointment of counsel, amendment of the petition and further pleadings, the district court denied relief on May 27, 1988. 686 F. Supp. 743, 743, 751 (E.D. Mo. 1988), *aff'd*, 880 F.2d 1 (8th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990). In Blair v. Armontrout, 643 F. Supp. 785, 786 (W.D. Mo. 1986), *aff'd*, 916 F.2d 1310 (8th Cir. 1990), *cert. denied*, 112 S.Ct. 89 (1991), the district court decided the litigation within three months of the filing of the traverse. Likewise, in Smith v. Armontrout, 692 F. Supp. 1079, 1084-85 (W.D. Mo. 1988), *aff'd*, 888 F.2d 530 (8th Cir. 1989), *stay denied*, 493 U.S. 1039 (1990), the district court decided the litigation within six months of the filing of the amended petition. These examples illustrate the ability of the district courts to comply with a rule like that proposed by petitioners (Petition, pp. 14-16).

2. Ineffective Appellate-Court Orders

In re Paul Delo, No. 92-3468 (8th Cir. Dec. 11, 1992), Anthony LaRette filed his petition for writ of habeas corpus on April 11, 1986. Six and a half years later, the district court had not decided the petition. After multiple inquiries to the district court concerning the habeas litigation,

the state sought relief from the court of appeals. The appellate court issued the writ of mandamus and concluded: "[T]he underlying habeas case brought by LaRette must be expedited and not delayed any longer." The district court was ordered to consider the issues presented in the habeas corpus petition and to enter final judgment within one hundred fifty (150) days of December 11, 1992. While the district court denied federal habeas corpus relief on the 150th day (May 10, 1993), LaRette's motion under Fed. R. Civ. P. 59(e) has been pending before that court for almost five months without a decision.

In the Larry Griffin litigation, the district court was given one hundred eighty (180) days to resolve the remand issues. Griffin v. Armontrout, 961 F.2d 793, 794 (8th Cir.) (requiring district court to resolve new claims within 180 days). At the request of Mr. Griffin, the court of appeals stayed the 180-day time period until this Court resolved the state's petition for writ of certiorari, a petition denied by this Court on October 5, 1992. Delo v. Griffin, 113 S.Ct. 296 (1992). Afterward, the court of appeals entered an order beginning the 180-day period on October 23, 1992. The time period was to expire on April 21, 1993.

On April 21, 1993, the district court requested by letter until May 7, 1993, in which to complete its responsibility under the court of appeals' mandate. The court of appeals granted the district court's request. On May 6, 1993, the district court requested an indefinite time in which to comply with the court of appeals' mandate. The state opposed the district court's request, and on May 17, 1993, the court of appeals informed the district court that it had until June 15, 1993, in which to comply with the appellate court's mandate. On June 15, 1993, the district court requested

another extension due to "exigent circumstances." The district court did not explain what "exigent circumstances" meant. Nonetheless, the court of appeals granted the district court until July 2, 1993, in which to comply with the appellate court's mandate. On July 2, 1993, the district court entered an order resolving the remand issues, but allowing Mr. Griffin to file a third amended petition. The district court did not indicate when it intended to decide the third amended petition. The state filed with the appellate court a "Motion to Enter Appropriate Orders." Two months passed before the appellate court granted the state's motion on September 9, 1993. The appellate court found that the district court's July 2, 1993 order "was not, of course, the final consideration we directed on April 14, 1992." Griffin v. Delo, No. 90-2377, slip op. at 1 (8th Cir. Sept. 9, 1993). The appellate court ordered the district court to decide the third amended petition within forty-five days of September 9, 1993. Id.

There are other examples of unsuccessful actions by the appellate court. In In re A. L. Lockhart, No. 90-1489 (8th Cir. May 24, 1990), the State of Arkansas filed a petition for writ of mandamus concerning the Eddie Miller v. A. L. Lockhart litigation (U.S.D.C. No. PB-C-81-152) and the Darryl Hill v. A. L. Lockhart litigation (U.S.D.C. No. PB-C-82-375). Miller's stay of execution had been entered on May 11, 1981. Miller v. Lockhart, 515 F. Supp. 3 (E.D. Ark. 1981). Mr. Hill's petition had been pending since 1982. After ordering a response from the district court, the court of appeals denied the petition for writs of mandamus. The court, however, ordered: "The district court should give expedited consideration to disposition of the cases referred to in the petition." In re A. L. Lockhart, No. 90-1489 (8th Cir. May 24, 1990). The Arkansas district court did not comply

with the directive of the court of appeals since it took over three years for it to decide the Hill litigation. Hill v. Lockhart, 824 F. Supp. 1327 (E.D. Ark. 1993). The district court has not decided the Miller litigation even though almost three and one-half years have passed since the court of appeals ordered expedited consideration.

The delay by the Arkansas district courts in resolving capital habeas cases has created friction between state and federal judiciaries. Members of the Arkansas Supreme Court have spoken out about the delay.

> Unfortunately, other abuses of our post-conviction remedies continue to occur besides the one we have here. In our recent case of Robertson v. State, 298 Ark. 131, 765 S.W.2d 936 (1989), Justice Hickman, in a concurring opinion, recounted the history of our review of capital cases. *See also* Fretwell v. State, 289 Ark. 91, 708 S.W.2d 630 (1986) (Hickman, J., concurring), and Ruiz & Van Denton v. State, 280 Ark. 190, 655 S.W.2d 441 (1983) (Hickman, J., concurring). Justice Hickman cited capital cases that appeared to have come to the end of the direct appeal and post-conviction relief processes, only to find that the cases--some of which he identifies by name--have entered the federal judicial machinery where they seemingly disappear. As Justice Hickman noted, our court affirmed Eddie Lee Miller's conviction in 1980, but Miller filed a habeas petition in federal district court in 1981. Eight years have passed and the federal court has failed to rule on

> Miller's petition. Clay Anthony Ford['s] and Darrell Wayne Hill's cases have been pending in federal district court since January 1983 and February 1983, respectively, and no final decisions, as yet, have been entered by the federal court. There are others, as well, but it is of little value to repeat here those cases already fully identified in Justice Hickman's earlier concurring opinion. Suffice it to say, that despite this court's best efforts to expedite and review these serious appeals and post-conviction petitions, these cases inevitably end up in the federal judicial system, where too often they languish.

Whitmore v. State, 299 Ark. 55, 771 S.W.2d 266, 268 (1989); *see also* Davis v. State No. CR 92-1385, slip op. at 18-22 (Ark. Sup. Ct. Oct. 4, 1993) (Glaze, J., concurring); O'Rourke v. State, 300 Ark. 323, 778 S.W.2d 938, 940 (1989) (Glaze, J., dissenting); Robertson v. State, 298 Ark. 131, 138-39, 765 S.W.2d 936, 941-44 (1989) (Hickman, J., concurring). Justice Glaze summarized:

> In fact, the manner in which the judiciaries as a whole, and the federal judiciary in particular, have handled these capital cases has been a public disgrace!

Id. at 940. Perhaps the term "friction" is an understatement.

In Mallett v. Delo, No. 92-2023 (8th Cir. Oct. 14, 1992) (unpublished), the court of appeals reversed the judgment of the district court and remanded it back for consider-

ation of the merits of Mr. Mallett's claims. The court of appeals pointed out:

> While this is a first petition for a writ of habeas corpus, proceedings to this point have consumed considerable time, and we are confident that the district court will proceed to the merits and decide the case carefully and expeditiously.

Id. slip op. at 2. About a year has passed without a decision by the district court.

The foregoing outlines the problems resulting from piecemeal mandamus litigation and other orders, requests and suggestions by the appellate court to the district courts. The automatic show-cause order system proposed by petitioners may solve these problems.

Periodically, this Court speaks of the "friction" that federal habeas corpus review creates between the federal and state systems of government. As the mandamus litigation and the Griffin litigation illustrate, the "friction" between the state and federal governments is quite high when the United States district court is a respondent in mandamus litigation. The "friction" is high when the state complains to the supervisory court of the lack of success of efforts by the district court to resolve a case accurately and expeditiously. There also may be "friction" when a district court requests additional time to comply with a mandate and the state must oppose that request as unreasonable. "Friction" is inherent to mandamus litigation. While the automatic show-cause order systems suggested by petitioners may have similar problems, those problems should be minimal if the courts of appeal

fairly enforce the time deadlines without prompting from the states.

The show-cause system proposed by petitioners should also be less cumbersome than the current mandamus litigation. Capital habeas litigation should not be complicated by rounds of collateral extraordinary litigation before the appellate courts. Further, the proposal will be more efficient than mandamus litigation.

The foregoing policy reasons support implementation of the system suggested by petitioners. The suggested time rules will not be a panacea, but they should prevent the never-ending district-court litigation described by petitioners and *amicus curiae*. The rules are certainly better than nothing, the *status quo*.

CONCLUSION

For all of the above-stated reasons, *amicus curiae* respectfully request that the Court grant petitioners' petition for writ of certiorari and order the relief requested by petitioners on behalf of the State of Arizona.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

Amicus Curiae

FILED
DEC 13 1993
OFFICE OF THE CLERK

No. 93-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ARIZONA ATTORNEY GENERAL,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
Respondent,

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, JIMMY ALAN ARNETT,
Real Parties in Interest.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. AYER
(Counsel of Record)
SARAH L. WANNER
STEPHEN J. JORDEN

JONES, DAY, REAVIS & POGUE
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-4689

Counsel for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred in refusing, on petition for mandamus, to direct respondent to accelerate its handling of three capital habeas corpus cases, and to promulgate general time limitations applicable to all capital habeas corpus petitions pending within the circuit.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 2

1. Correll v. Lewis 3
2. Villafuerte v. Lewis 5
3. Arnett v. Lewis 6

REASONS FOR DENYING THE WRIT 8

I. THERE IS NO BASIS FOR AN ORDER OF MANDAMUS RELATING TO RESPONDENT'S HANDLING OF THE *CORRELL, VILLAFUERTE OR ARNETT* PETITIONS 9

A. Mandamus Is An Exceptional Remedy Which Is Only Available To Limit A Court's Discretionary Control Of Its Calendar Where The Court Has Persistently Refused To Adjudicate A Matter Properly Before It 9

B. Petitioner Has Failed To Show Any Refusal Or Unreasonable Delay By The District Court In Exercising Its Jurisdiction To Resolve The Habeas Corpus Petitions In Issue 15

II. THIS COURT SHOULD NOT GRANT REVIEW FOR THE PURPOSE OF PROMULGATING PROSPECTIVE TIME-LIMITS ON THE HANDLING OF FEDERAL HABEAS CORPUS CASES 20

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), *cert. denied*, 497 U.S. 1031 (1990) 3, 17
Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 9, 10, 23
Amadeo v. Zant, 486 U.S. 214 (1988) 14
Arizonians for Fair Representation v. Symington, 828 F. Supp. 684 (D. Ariz. 1992), *aff'd* 113 S.Ct. 1573 (1993) 23
Arnett v. Ricketts, 665 F. Supp. 1437 (D. Ariz. 1987) 6
Barefoot v. Estelle, 463 U.S. 880 (1983) 12, 14
Barker v. Wingo, 407 U.S. 514 (1972) 21, 25
In re Blodgett, 112 S. Ct. 674 (1992) 11, 12, 13, 14, 20
Bounds v. Smith, 430 U.S. 817 (1977) 14
Campbell v. Blodgett, 940 F.2d 549 (9th Cir. 1991) 13, 14, 15
Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74 (1970) 22
Insurance Co. v. Comstock, 83 U.S. (16 Wall.) 258 (1873) 15
Johnson v. Rogers, 917 F.2d 1283 (10th Cir. 1990) 16
Jones v. Shell, 572 F.2d 1278 (8th Cir. 1978) 16
Kimmelman v. Morrison, 477 U.S. 365 (1986) 13
La Buy v. Howes Leather Co., 352 U.S. 249 (1957) 15
Lewis v. Jeffers, 497 U.S. 764 (1990) 3, 17
Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927) 10
McClellan v. Young, 421 F.2d 690 (6th Cir. 1970) 16
McCleskey v. Zant, 111 S. Ct. 1454 (1991) 14, 25
Miner v. Atlass, 363 U.S. 641 (1960) 21
Ortega Rodriguez v. United States, 113 S. Ct. 1199 (1993) 24
Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) 9

TABLE OF AUTHORITIES (Cont'd)

Page

Sawyer v. Whitley, 112 S. Ct. 2514 (1992) 12
Sibbach v. Wilson & Co., 312 U.S. 1 (1941) 22
Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) 15
United States v. Taylor, 487 U.S. 326 (1988) 10
Vasquez v. Hillery, 474 U.S. 254 (1986) 14
Walton v. Arizona, 497 U.S. 639 (1990) 3
Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978) . . . 10, 11
Will v. United States, 389 U.S. 90 (1967) 15
Wingo v. Wedding, 418 U.S. 461 (1974) 14
Zant v. Stephens, 462 U.S. 862 (1983) 13

Statutes and Rules

28 U.S.C. § 332(d) (1988) 22
28 U.S.C. § 1254(1) (1988) 2
28 U.S.C. § 1292(b) (1988) 7
28 U.S.C. §1651(a) (1988) 2
28 U.S.C. § 1657 (1988) 11
28 U.S.C. § 2071 (1988) 21
28 U.S.C. § 2072 (1988) 21
28 U.S.C. § 2074 (1988) 21
Speedy Trial Act, 18 U.S.C. § 3161 *et seq* 21
Ariz. R. Crim. P. 32 25
28 U.S.C. § 2254, Rules Governing Section 2254 Cases in the United States District Courts, R. 8 (1988) 12, 21

Miscellaneous Authorities

Administrative Office of the United States Courts, Management Statistics for United States Courts (1978) 10
Administrative Offices of the United States Courts, Management Statistics for United States Courts (1992) 10, 22

TABLE OF AUTHORITIES (Cont'd)

Page

Sarah Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 Colum. L. Rev. 1433 (1984) 21
Chief Justice Discusses Changes in Justice System, The Third Branch, Nov. 1993, at 7 8
Ninth Circuit Judicial Council's Death Penalty Task Force, *Capital Punishment Handbook* (1991) 25
16 Charles A. Wright, *et al.*, *Federal Practice and Procedure* § 3933 (1977) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-406

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ARIZONA ATTORNEY GENERAL,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

Respondent.

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, JIMMY ALAN ARNETT,

Real Parties in Interest.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. B-1) is unreported.

STATEMENT OF JURISDICTION

The order of the court of appeals denying the State's petition for mandamus was entered on July 21, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651(a) (1988).

STATEMENT OF THE CASE

This case arises from the denial of a petition for a writ of mandamus filed by the State of Arizona on July 1, 1993 with the United States Court of Appeals for the Ninth Circuit. The petition asked the court of appeals to order respondent[1] to rule on five capital habeas corpus cases in accordance with particular time limitation periods applicable to different aspects of the proceedings, and to promulgate those time limits as generally applicable to district courts in the handling of capital habeas corpus cases.[2] Respondent did not respond, and on July 21, 1993, the Ninth Circuit denied the petition in a one-sentence order. The State now petitions for certiorari from the Ninth Circuit's denial concerning three of the five cases on which relief was originally sought.[3]

A brief procedural history of the three cases in issue is set forth below.[4]

---

[1] Respondent, the United States District Court for the District of Arizona, will be also be referred to herein as "the court."

[2] Petitioner urged that district courts be allowed 120 days to decide dispositive motions, 30 days to decide procedural motions, and 180 days to hold an evidentiary hearing. Pet. App. A-17, A-26.

[3] In addition, the State further "prays that the Court exercise its supervisorial authority and order that the District Court rule on all future capital cases" within the same specified time limits that it urged on the court of appeals. (Pet. at 19).

[4] A more complete chronology of significant events is attached as Appendix A, where bold text indicates information that was not included in the State's petition for certiorari.

1. Correll v. Lewis.

On September 18, 1987, respondent granted Michael Emerson Correll's application for a stay of execution. On January 7, 1988, the court granted Correll's request for leave to file an amended petition, which was filed on February 24, 1988. On April 10, 1989, the State filed a motion to dismiss the amended petition, alleging that Correll failed to exhaust his remedies in State court.[5] Respondent denied that motion on June 5, 1989.

On June 14, 1989, the State moved for a stay of all further proceedings, in light of the Ninth Circuit's decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), *cert. denied*, 497 U.S. 1031 (1990), finding Arizona's death penalty statute unconstitutional. On July 21, 1989, the court granted the State's request only with respect to the sentencing phase claims, and ordered the State to file a response to the guilt phase claims by August 20, 1989.

On September 7, 1989, the State filed two separate summary judgment motions addressing only the guilt phase claims. On March 14, 1990, respondent granted Correll's request to amend the petition by adding two claims, and the State subsequently filed a third summary judgment motion with respect to these newly-added claims.

On July 13, 1990, the entire case was transferred to a newly-appointed district court judge. On September 6, 1991, the State requested a ruling in the case and cited this Court's decisions in *Walton v. Arizona*, 497 U.S. 639 (1990), and *Lewis v. Jeffers*, 497 U.S. 764 (1990), which upheld particular applications of the Arizona death penalty statute and which had been handed down fourteen months earlier. On September 28, 1991, respondent set a status conference for October 4, 1991.

---

[5] The State claimed that it had not received any notice of two court orders requiring a timely response to any amended petition. However, the amended petition had attached to it a proof of service showing that it had been served on the State.

At the October 4, 1991 status conference, the State asked respondent to allow Correll to amend his petition to raise additional claims and supplement previous claims, and agreed with respondent and Correll's counsel that the most efficient approach to disposing of the entire case was to vacate the previously filed motions for summary judgment and proceed by filing a single motion addressing all issues. Respondent vacated the prior stay concerning sentencing claims, set a briefing schedule and scheduled a status conference for May 11, 1992.

Accordingly, on December 6, 1991, Correll filed an amended petition that raised approximately fifty-three separate claims. On February 14, 1992, the State filed a motion for summary judgment addressing both procedural default and merits issues. On May 15, 1992, Correll filed his response and moved to expand the record. On June 19, 1992, respondent heard oral argument on the State's motion for summary judgment.

On July 22, 1993, respondent filed a thirty-nine-page order denying Correll's motion to expand the record, and finding procedural default as to twenty-six claims because (1) some claims were never presented in any state forum; (2) some claims were presented in a procedurally inappropriate manner and were found defaulted by the state courts; (3) some claims, even if presented and reviewed, were waived by Correll's failure to preserve them in a motion for rehearing; and (4) the Arizona Supreme Court found two of the claims waived on direct review.

The order permitted Correll thirty days to submit any arguments demonstrating cause and prejudice, and granted the State's May 29, 1992 motion for an extension of time to file a brief responding to allegations of cause and prejudice and, if necessary, further addressing the merits of certain claims. Respondent then noted that the remainder of the State's summary judgment motion would be ripe for final adjudication only when the State had responded to Correll's assertions of cause and prejudice or addressed the merits of any defaulted claims for which Correll was able to demonstrate cause and prejudice.

On August 31, 1993, the State filed objections to respondent's order, arguing that Correll should not be allowed additional time to demonstrate cause and prejudice. On September 13, 1993, Correll filed a motion for reconsideration, which set forth his position concerning cause and prejudice. On October 18, 1993, respondent held a status conference at which it granted the State's motion to file late its response to Correll's motion.

On November 1, 1993, the State filed its final response on the issues of cause and prejudice.

2. Villafuerte v. Lewis

On May 14, 1991, respondent issued a stay of the execution of Jose Roberto Villafuerte. On July 19, 1991, Villafuerte filed his first amended petition for a writ of habeas corpus, and the State responded with a motion for summary judgment on August 26, 1991.

On October 11, 1991, Villafuerte filed a motion to expand the record and a request for an evidentiary hearing. On November 14, 1991, after receiving all of the parties' briefs addressing the outstanding motions, respondent scheduled oral argument for March 16, 1992.[6]

Following argument, on August 3, 1992, respondent issued a written order that found six claims procedurally barred, required Villafuerte to demonstrate cause and prejudice as to those claims in a supplemental brief, and dismissed without prejudice Villafuerte's motion for an evidentiary hearing. On August 21, 1992, Villafuerte moved for reconsideration of respondent's order (in lieu of briefing on issues of cause and prejudice). The State filed its opposition on September 4, 1992, and supplemented that opposition on October 15, 1992.

---

[6] Between November 14, 1991 and March 16, 1992, the State filed the transcripts from the state court proceedings and, pursuant to respondent's December 10, 1991 order, Villafuerte filed a statement of facts in support of his response to the State's summary judgment motion.

On July 9, 1993, respondent issued a written order that denied Villafuerte's motion for reconsideration of respondent's August 3, 1992 order and entered summary judgment for the State on the six claims found barred. On September 29, 1993, respondent issued an eighty-one-page order that denied Villafuerte relief on the merits of the remaining twenty-one claims and vacated the stay of execution.

3. Arnett v. Lewis

After vacating its prior dismissal of Jimmy Alan Arnett's initial petition for habeas corpus that was filed in 1983, respondent, on November 22, 1985, granted Arnett's motion for discovery, and *sua sponte* granted summary judgment for the State on several claims in Arnett's amended petition.[7] From April 1986 to July 1986, Arnett filed several partial summary judgment motions, a motion for an evidentiary hearing, and a motion for discovery. In response, the State filed two separate cross motions for partial summary judgment.

On February 25, 1987, respondent ruled on fourteen of Arnett's sixteen claims. Respondent ruled for Arnett on several claims related to his sentencing, including ineffective assistance of counsel, and set the death sentence aside. Arnett's claim that his 1976 confession -- which formed the basis of his conviction -- was coerced was not addressed by any summary judgment motion, and accordingly the court ordered that an evidentiary hearing be held. *Arnett v. Ricketts*, 665 F. Supp. 1437, 1440-46 (D. Ariz. 1987). On March 30, 1987, over the objection of Arnett's counsel, respondent granted a motion by the State to stay the federal habeas proceeding to allow a habeas proceeding in state court to go forward.

Nineteen months later, following affirmance by the Arizona Supreme Court of Arnett's conviction and death sentence, the State asked respondent to lift the stay of the federal habeas

---

[7] The procedural history of *Arnett* before November, 1985 is described in Appendix A, at 9a.

proceeding, and moved for reconsideration of the February 25, 1987 order. In the alternative, the State also sought permission to pursue an interlocutory appeal of the court's order under 28 U.S.C. § 1292(b) (1988). On November 28, 1988, the court vacated the earlier stay of proceedings, but denied the State's additional requests. And consistent with its earlier findings, the court granted Arnett's motion to depose various individuals to prepare for the evidentiary hearing on the allegations of involuntary confession.

On July 12, 1990, while the parties were still conducting discovery, the case was reassigned to a newly-appointed judge. On August 24, 1990, respondent scheduled an evidentiary hearing for October 29, 1990, but that date was subsequently vacated to allow further discovery and clarify a number of evidentiary issues. At status conferences on October 12, 1990 and November 26, 1990, and at a December 6, 1990 preliminary hearing, the parties and respondent discussed issues involving discovery and presentation of evidence. Arnett also filed with the court seven videotaped depositions relating to Arnett's allegedly coerced confession. Respondent noted that it would review the tapes for admissibility and ordered supplemental briefing concerning the admissibility of evidence.

On September 27, 1991, the court granted Arnett's request to retain an expert witness. On January 13, 1992, respondent held a status conference at which respondent inquired of the parties whether all of the claims raised in the first amended petition were addressed by the court's February 25, 1987 order. In the course of that conference, it became clear that additional discovery was necessary to prepare for the evidentiary hearing.

On April 23, 1992, Arnett filed an additional motion for partial summary judgment on certain claims in the amended petition. The State filed its response on May 13, 1992. Arnett filed his reply on July 2, 1992.

At a September 15, 1993 status conference, the admissibility of various exhibits was discussed at length, and the court scheduled an evidentiary hearing for November 16, 1993. Although the

State represented to respondent that all trial phase claims had been resolved in its favor, respondent pointed out that a claim regarding a jury instruction on malice had never been resolved or even addressed on the merits by the State. On September 28, 1993, the court ordered the State to file a motion for summary judgment on the remaining claim so that the entire case would be ripe for decision. On October 15, 1993, the State filed that motion, and on November 1, 1993, Arnett filed his response.

The evidentiary hearing on the issue of the allegedly coerced confession occupied five court days and was completed on December 2, 1993. The court set a final briefing schedule, to be completed in January 1994.

REASONS FOR DENYING THE WRIT

Petitioner urges this court to invoke the extraordinary remedy of mandamus for a purpose to which it is completely unsuited -- oversight of the exercise of judicial discretion in managing the increasingly heavy workload impinging on the federal courts. As the Chief Justice has stated, "we have gone from a system of under-utilized judicial resources 40 years ago to a system which today is straining at the seams to accommodate the case loads which are thrust upon it." *Chief Justice Discusses Changes in Justice System*, The Third Branch, Nov. 1993, at 7. The continued expansion of filings compresses the time available to hear cases and render decisions, and courts like respondent with especially heavy dockets face an endless challenge to their creativity in seeking to assure that matters are resolved with dispatch.

Habeas petitions in capital cases are among the most litigious and adversarial proceedings on the federal docket. Given the number and complexity of the claims, the numerous interim motions, requests for resources, and factual issues to be resolved, the task facing the district courts is arduous, even when viewed in isolation. That the task must be carried forward under the extreme case load pressures now prevailing, and with the constant possibility of new decisions that will expand, render moot, or put

pending issues in an entirely new light, makes it all the more difficult.

Within the constraints of the case load which it must carry, and in light of the particular issues presented in the cases whose handling is challenged, respondent has moved expeditiously in resolving the death penalty habeas corpus cases presented to it, including those specifically referenced by the State. It has also shown substantial initiative and innovation in finding ways to improve the functioning of the dual state-federal collateral review process mandated by law.

As this Court has observed, the use of mandamus "has the unfortunate consequence of making a district court judge a litigant." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Its inappropriateness as a way of forcing courts to move cases more quickly is especially apparent in the context of federal habeas corpus cases, where the numerous and sometimes complex factual and procedural issues make any assessment of judicial timeliness a burdensome endeavor.

For all of these reasons, the State's petition should be denied.

I. THERE IS NO BASIS FOR AN ORDER OF MANDAMUS RELATING TO RESPONDENT'S HANDLING OF THE *CORRELL, VILLAFUERTE OR ARNETT* PETITIONS.

A. Mandamus Is An Exceptional Remedy Which Is Only Available To Limit A Court's Discretionary Control Of Its Calendar Where The Court Has Persistently Refused To Adjudicate A Matter Properly Before It

The remedy of mandamus, as applied to the conduct of a federal judge, is a "drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp.*, 449 U.S. at 34. Its application has been limited to confining "an inferior court to a lawful exercise of its prescribed jurisdiction or to compel[ling] it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

In general, mandamus is available only where there is a "clear and indisputable" right to the relief sought, and the party seeking it has "no other adequate means to attain the relief [it] desires." *Allied Chemical Corp.*, 449 U.S. at 35 (quotation marks omitted). It is not an appropriate vehicle for reviewing matters committed to a judge's discretion, because "[w]here a matter is committed to the discretion [of a district court], it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Id.* at 36 (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (plurality opinion)).

Fifteen years ago, in reversing a grant of mandamus directing a district court to accelerate its handling of a particular matter, a plurality of this Court noted that the heavy case loads handled by federal judges, imposing "competing demands on [judges'] time for matters properly within [their] jurisdiction and . . . inevitable scheduling difficulties because of the unavailability of lawyers, parties, and witnesses," require that judges have "a wide latitude in setting [their] own calendar[s]." *Will*, 437 U.S. at 665.[8] *Accord United States v. Taylor*, 487 U.S. 326, 343 (1988); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 707 (1927). In view of this broad discretion, mandamus directed to the speed

---

[8] Competition for the time of federal district court judges has increased dramatically since *Will v. Calvert Ins. Co.* In the District of Arizona, for example, there has been an increase of 141 cases per judge, from 421 to 562, between 1978 and 1992. The 1992 figures placed respondent seventh in the United States and second in the Ninth Circuit in caseload per judge. *See* Administrative Office of the United States Courts, Management Statistics for United States Courts, at 100 (1978) ("1978 Rep."); Administrative Office of the United States Courts, Federal Court Management Statistics, at 126 (1992) ("1992 Rep.").

This increase pales, however, when compared with the rate of increase in new filings of civil prisoner petitions, which in 1992 in the District of Arizona exceeded new filings of civil prisoner petitions in 1978 by almost fivefold. *See* 1978 Rep. at 100 (reflecting 266 civil prisoner petitions filed in 1978); 1992 Rep. at 126 (reflecting 1316 civil prisoner petitions filed in 1992).

with which a court acts is reserved for exceptional situations where a court's "undue delay is tantamount to failure to exercise jurisdiction." 16 Charles A. Wright, *et al.*, *Federal Practice and Procedure*, § 3933, at 223 (1977). Unless the court "obstinately refuses to adjudicate a matter properly before it" -- thus failing to "'exercise the jurisdiction of review given by law'" -- delays in the handling of a case cannot be addressed by mandamus. *Will*, 437 U.S. at 661-662, 666 (citations omitted).

This Court's decision in *In re Blodgett*, 112 S.Ct. 674 (1992) -- denying mandamus -- is not to the contrary.[9] In that case, the court of appeals granted an indefinite stay of execution in March 1989, heard argument in June 1989, and took no further action of any kind until February 1991 -- 23 months after it issued its stay and 20 months after oral argument.[10] Even then, the court of appeals only acknowledged the developments which had occurred in the case, requested an update on the status of a state court petition for collateral relief which had been filed seven months earlier, and stated that the case was no longer under submission. Following denial of the state court petition for collateral relief, the court of appeals on August 7, 1991 granted petitioner's motion to

---

[9] Nor does 28 U.S.C. § 1657, creating a statutory priority for habeas petitions, support a different result. That statute recognizes four separate categories of civil cases requiring expedition, including "any other action if good cause is shown"; sets no time limits for or priorities among the four classes; and generally recognizes that "each court of the United States shall determine the order in which civil actions are heard and determined." 28 U.S.C. § 1657(a). Thus, Congress recognized and approved the exercise of discretion necessarily vested in "each court" with respect to scheduling.

[10] In failing to take any action during this time period, the court ignored three separate motions filed in January, April and September of 1990 to withdraw certain issues to allow petitioner's filing of an additional state court petition for collateral relief. In addition, the Washington Attorney General sent letters to the panel in April and October 1990, inquiring about the status of the case, but neither letter was answered. 112 S.Ct. at 675.

proceed *pro se* with a third federal petition for habeas corpus, left its March 1989 stay in effect, and indicated that it would take no further action until the district court ruled on the new federal petition.

This Court, presented with an original petition for mandamus challenging the actions of the Ninth Circuit, found "grounds to question both the necessity and the propriety of the Ninth Circuit's order of August 7, 1991," but concluded that the requested relief was foreclosed by the State's failure to lodge its objection to that order initially with the court of appeals. 112 S.Ct. at 676. In reaching this result, the Court stated the following rule:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

Id.

By its terms, this directive imposes on district courts the duty to exercise their discretion to insure that consideration of the issues presented is *both* expeditious and careful.[11] For

---

[11] While "[f]ederal courts are not forums in which to relitigate state trials," they must, in the context of habeas corpus review, "give nonfrivolous claims of constitutional error the careful attention that they deserve." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The task of providing expeditious but genuine review of the numerous claims often raised by habeas petitioners facing the death penalty is a tedious and difficult one, and demands careful consideration of the trial record and, often, receipt of additional evidence. *See, e.g.*, Rules Governing Section 2254 Cases in the United States District Courts, Rule 8 (requiring district court to determine whether an evidentiary hearing is required on habeas petitions); *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992)(in death penalty cases, even where Court's cases preclude review of the merits of successive, abusive or procedurally defaulted claims, petitioner may require the federal court to hear the merits upon a

mandamus to be appropriate based on an alleged breach of this duty, it must be clear and indisputable under the circumstances that the court has failed "to ensure a prompt resolution of the matter." As with any petition for mandamus, this will be true only in the exceptional case, where unique circumstances make unmistakable the court's disregard of the duty upon it.

Assuming *arguendo* that mandamus would have been appropriate in *Blodgett* but for the State's failure to object to the court of appeals' order, critical characteristics of that case show that it is no precedent for using mandamus as a general remedy to address perceived judicial tardiness in handling initial habeas corpus petitions. Perhaps most obviously, while judicial delay provides the backdrop of the challenged conduct at issue in *Blodgett*, the mandamus petition there challenged a particular order of the Ninth Circuit. *See Campbell v. Blodgett,* 940 F.2d 549 (9th Cir. 1991). The issue thus posed was whether, in context, the August 7, 1991 order exceeded the appellate court's authority -- in part by retaining jurisdiction over a case that was no longer, in any substantive respect, pending before it. 112 S.Ct. at 675-676. This focus of the issue in *Blodgett* thus distinguishes that case sharply from those where the claim is that a judge has simply taken too long, overall, to resolve particular petitions pending before him.

It is also noteworthy that *Blodgett* involved delay in handling the appeal of denials of successive habeas petitions, not the district court's resolution of an initial petition, as is involved here.

---

showing of "actual innocence" of the crime, or inapplicability of the death penalty; concluding, "in view of all of the other evidence in the record," that petitioner had not established "actual innocence of death"); *Kimmelman v. Morrison*, 477 U.S. 365 (1986)("It will generally be appropriate for a reviewing court to assess counsel's overall performance in the case in order to determine whether . . . counsel rendered reasonable professional assistance"); *Zant v. Stephens*, 462 U.S. 862, 883, 885 (1983) (habeas petitions in capital cases require "careful scrutiny" since the death penalty is "qualitatively different" than other sentences and requires greater reliability).

This Court has made clear that second and successive petitions for habeas corpus "present a different issue" from that raised by an initial petition, and that a greater degree of expedition in that context may well be appropriate. *Blodgett*, 112 S.Ct. at 676; *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). The potential for abuse inherent in such repetitive petitions dictates that they be scrutinized with a critical eye lest they become simply a means of delay. *See McCleskey v. Zant*, 111 S.Ct. 1454, 1467-70 (1991). Such decisions limiting the habeas remedy rest on the premise that claims should have been presented initially, and do not suggest that meaningful review is simply unavailable if it takes too long. [12] Moreover, an appellate court, as in *Blodgett*, has less reason to engage in extended proceedings because it has a duty to affirm if the court below is correct on the law and its factual findings are not clearly erroneous. *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). Respondent is not authorized to provide appellate-style review to the initial petitions pending before it.

In sum, the use of mandamus to abrogate a court's discretion to control its docket and to reconcile expedition with fairness in

---

[12] While this Court has discussed at length and formulated principles to address the potential for delay and abuse inherent in second and successive habeas petitions, it has not wavered from the proposition that parties have a right to full and fair consideration of properly preserved and presented federal constitutional claims raised on an initial habeas corpus petition filed in federal court. *See, e.g., Vasquez v. Hillery*, 474 U.S. 254, 260 (1986)(writ of habeas corpus has "throughout its history" contemplated "meaningful federal review of constitutional claims"); *Bounds v. Smith*, 430 U.S. 817, 827 (1977) (habeas corpus petitions "are of fundamental importance . . . in our constitutional scheme because they directly protect our most valued rights") (quotations omitted); *Wingo v. Wedding*, 418 U.S. 461, 468 (1974)("root principle [of habeas corpus] is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment") (quotations omitted).

particular cases is without support in *Blodgett* or any other decision of this Court.[13]

B. Petitioner Has Failed To Show Any Refusal Or Unreasonable Delay By The District Court In Exercising Its Jurisdiction To Resolve The Habeas Corpus Petitions In Issue

A brief consideration of the cases at issue here demonstrates that no unreasonable delay -- and certainly none remediable by

---

[13] In addition to *Blodgett*, petitioners mischaracterize other holdings of this Court relating to the availability of mandamus. Faced with prayers for mandamus based on claims of "'persistent disregard' of the rules of this Court" (Pet. at 14), the Court has exhibited the same restraint that has marked its decisions focused on judicial delay. *See Will v. United States*, 389 U.S. 90 (1967) (willful disobedience to this Court's rules would not be inferred from district court's orders tailored to the needs of the case). And in those cases where mandamus has issued based on a court's refusal to act, ordinarily there has been an order of the lower court disposing of the case in an inappropriate way which denies effective appellate review, *see Insurance Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1873)(mandamus would be appropriate to direct court of appeals to decide case improperly dismissed for lack of jurisdiction); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (mandamus can issue where district court entered an order remanding diversity case to state court on a ground -- docket congestion -- not authorized by statute), or other extreme circumstances making the breach of duty unmistakable. *See La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (mandamus issued where district court entered orders referring two cases for trial before a master because of docket congestion; trial court's orders abused its reference authority under court rules and "amount[ed] to little less than an abdication of the judicial function depriving the parties of [a] trial[] before the court on the basic issues involved in the litigation").

The State's intimations to the contrary (Pet. at 14 n.5), the Court has never issued mandamus to a court that "is doing the best it can with its current case load," imposing upon it a rigid set of time limits applicable to an entire class of cases and without regard to the impact on the rest of the lower court's docket.

mandamus -- occurred with regard to any of them. Contrary to the State's assertion of a refusal to act, the record, in each case, reflects a steady progression of events toward ultimate resolution by the court.

The State first complains generally about the time that has elapsed since the petitions in *Correll* and *Arnett* were filed. (Pet. at 11). As a preliminary matter, the issue for the Ninth Circuit to decide on the State's petition was whether the records in those cases clearly demonstrated a basis for directing specific action by the court at the time the relief was sought. It did not confer upon the appellate court a roving commission to scrutinize years of procedural history.

Rather than address specific examples of delay in the individual cases, the State relies on the circular logic that motions not decided within the arbitrary time limits the State now seeks to have imposed are therefore untimely. However, each petition for habeas corpus presents particular issues and demands upon the court's time, which must be reconciled with all the other obligations facing the court. That some decisions are not made within the time limits the State suggests does not establish an abdication of respondent's duties.[14]

---

[14] None of the court of appeals cases cited by the State (Pet. at 14 n.5) supports mandamus in this case. *Johnson v. Rogers*, 917 F.2d 1283 (10th Cir. 1990), for example, involved the fourteen-month failure of a court to hear a prisoner's petition challenging a substantial change in his presumptive parole date. There were no stays in that case, and the State promptly filed a response making the entire case ripe for an immediate hearing. Similarly, in *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970), the court of appeals issued a writ of mandamus to the district court where the sole issue before the district court was one that had already been answered by the court of appeals. In *Jones v. Shell*, 572 F.2d 1278 (8th Cir. 1978), mandamus issued where the district court failed to carry out the court of appeals' mandate on remand by dismissing the petition rather than requiring the State to file a responsive pleading as required by the court of appeals' decision.

Further, the State is substantially responsible for much of the delay of which it complains. It has itself moved for and received lengthy stays of the proceedings.[15] The State has also pursued what can fairly be termed a piecemeal approach to defense of the petitions, filing a series of partial summary judgment motions that did not fully address the claims advanced. And it has, at times, been painfully slow to advise the court of developments outside the proceeding which would have allowed the action before the court to move forward.

The most significant delay in ruling on a motion occurred in *Correll* during the period immediately following the case's transfer to a new judge in July 1990. But after the State finally brought to the court's attention the fact that the sentencing phase claims in the case could now proceed -- fourteen months after this Court issued its decisions in *Walton* and *Jeffers* -- respondent promptly ordered a status conference. At that October 1991 conference, the State agreed with respondent that the best way to resolve the numerous claims in the case was for Correll to file an amended petition, and for the State to file one summary judgment motion addressing all of Correll's claims. That motion resulted in procedural default findings on approximately half of Correll's claims, which in turn required further briefing on cause and prejudice and, if the State desires, briefing on the merits. Briefing has subsequently proceeded on the cause and prejudice issues.

---

[15] In *Arnett*, over the objections of Arnett's counsel, the State received a stay of the entire proceeding on March 6, 1987. It did not request that the stay be lifted until nineteen months later. After that stay was lifted, rather than respond on the merits to Arnett's petition as previously ordered, the State again sought to stay the proceeding and to pursue an interlocutory appeal. Those motions were denied.

In *Correll*, the State also requested a stay of the entire proceeding on June 14, 1989, but the court granted the stay only as to the sentencing phase claims, which were affected by *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), *cert denied*, 497 U.S. 1031 (1990).

Villafuerte's petition was disposed of on September 2, 1993 in an eighty-one-page opinion addressing twenty-one claims on the merits and on procedural default grounds. The State implies that respondent ignored the case following oral argument on the State's summary judgment motion on March 16, 1992. Pet. at 11. However, from March 16, 1992 until respondent vacated the stay of execution on September 29, 1993, respondent resolved the preliminary but time-consuming issues of procedural default, allowed Villafuerte an opportunity to demonstrate cause and prejudice (and the State an opportunity to respond), and denied Villafuerte's motion for reconsideration.

In *Arnett*, the court resolved much of the habeas petition in 1987 by granting summary judgment to the State on some of Arnett's claims, granting him a resentencing because of numerous defects in the sentencing proceedings, and ordering an evidentiary hearing on his claim of involuntary confession -- a claim neither the State nor Arnett had addressed in a summary judgment motion. Since the February 1987 order in *Arnett*, the State has taken no initiative to seek resolution of the pending issues in the case but has acted only in response to actions by Arnett or the court.[16] The State recently filed a motion for summary judgment on the only remaining claim in *Arnett*, an alleged improper jury instruction on malice, but only at the request of respondent.[17]

Also in *Arnett*, preparation for the evidentiary hearing on the involuntary confession claim based on the conditions of incarceration has involved attempts to locate, interview, and depose prisoners and prison officials who were at the prison seventeen years ago, other discovery relating to the conditions of

---

[16] The State filed cross-motions for summary judgment in response to Arnett's summary judgment motions.

[17] Similarly, respondent notified the State at a January 13, 1992 status conference that it still had not responded to the four claims raised in Arnett's amended petition filed on November 28, 1989. The State agreed at the conference to file a cross motion for summary judgment on those claims.

the prison at that time, and discovery of expert witnesses regarding Arnett's mental state. At the January 13, 1992 status conference, it became clear that the parties had not completed discovery and could not estimate how long an evidentiary hearing would take. The State's mandamus petition to the Ninth Circuit was the first occasion on which the State objected to delay in conducting the evidentiary hearing.

The State's selection of these three cases ignores respondent's actual record in disposing of capital habeas petitions. In the months before the petition for mandamus was filed in the court of appeals, respondent resolved six capital habeas petitions, either on the merits or by extensive opinions sending them back to state court for further proceedings.[18] Moreover, respondent's record

---

[18] On February 23, 1993, the court denied a next friend petition, *Brewer v. Lewis*, No. 93-341-PHX-RGS, attempting to stay an execution. The petition had been filed just five days before respondent's decision, and respondent was required to devote extensive time and resources in order to resolve the petition promptly. Brewer was subsequently executed.

On November 19, 1992, in *Hooper v. Lewis*, No. 91-1495-PHX-SMM, respondent *sua sponte* dismissed a petition rather than hold the case in abeyance while Hooper returned to state court, as the State requested in a motion filed on October 27, 1992. The court found it unlikely that the State would prematurely seek an execution or that the Arizona courts would fail to adequately review Hooper's claims. Similarly, in *Bracy v. Lewis*, No. 90-1824-PHX-SMM, respondent dismissed the petition without prejudice on November 19, 1992, less than one month after Bracy notified respondent that he had commenced a state collateral proceeding.

In *Beaty v. Lewis*, No. 92-611-PHX-SMM, Beaty filed a request for stay of execution on April 2, 1992. After the State objected to this initial petition, the court issued an expedited briefing schedule and on May 7, 1992 granted a stay of execution for only 45 days while Beaty attempted to comply with state court procedures. On June 26, 1992, after Beaty had begun to follow state court procedures, the court dismissed the petition.

as a whole is completely incompatible with petitioner's claim that the court has refused to decide capital habeas corpus petitions. The Ninth Circuit properly recognized that the State failed remotely to meet its burden to justify a writ of mandamus with regard to *Correll*, *Villafuerte*, and *Arnett*; and the State has failed entirely to make its case for intervention by this Court.

II. THIS COURT SHOULD NOT GRANT REVIEW FOR THE PURPOSE OF PROMULGATING PROSPECTIVE TIME-LIMITS ON THE HANDLING OF FEDERAL HABEAS CORPUS CASES

Having failed to establish any unauthorized action or refusal to adjudicate a matter properly before it, as is necessary to support mandamus in an individual case, petitioners nonetheless urge this Court to take even more sweeping action. They argue that the Court should use these cases as a jurisdictional "vehicle . . . to force the Court of Appeals to exercise its supervisorial authority, and establish guidelines to enforce this Court's mandate in [*In re] Blodgett*[, 112 S.Ct. 674 (1992)]." Pet. Reply at 3. Petitioners' proposal that the Court "establish a 120-day time limit for ruling on dispositive motions, a 30-day time limit for ruling on procedural motions, and a 180-day time limit for scheduling an evidentiary hearing" in habeas cases involving capital sentences, Pet. at 16, must be rejected as unsuited for consideration on either a writ of certiorari to the Ninth Circuit or a petition for mandamus directed to this Court. In addition, it is a bad idea.

In *Harding v. Lewis*, No. 92-209-TUC-ACM, petitioner filed a request for a stay of execution on March 27, 1992, and on April 4, 1992, the day of the hearing, the court denied the stay of execution, dismissed the successive petition as abusive, denied a certificate of probable cause, and forwarded all materials in an expedited fashion to the Ninth Circuit. Harding was executed by the State on April 6, 1992.

In *Clark v. Lewis*, No. 84-350-TUC-WDB, petitioner requested that his case be re-opened and filed a successive petition on April 11, 1993. The next day, the court denied a stay of execution and dismissed the petition. Clark was executed in August 1993.

Insofar as the State requested the Ninth Circuit -- and now requests this Court -- to establish general time limitations on judicial action reaching beyond any particular case, there is no clear and indisputable right to the relief sought. Because the promulgation of rules concerning the timely administration of justice plainly involves an exercise of substantial discretion, the petition for mandamus is obviously without merit.

Further militating against the availability of mandamus, alternative avenues are available to pursue the sort of quasi-legislative proposal petitioners advance. Such an order directing that priority be given to particular categories of matters in accordance with a specified schedule would most appropriately be sought in the form of a federal statute, on the model of the federal Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, or a revision of the Federal Rules Governing Section 2254 Cases in the United States District Courts.[19] Alternatively, such relief might be sought

---

[19] *See* 28 U.S.C. §§ 2071, 2072, 2074 (1988) (permitting the various federal courts to prescribe their own rules for "the conduct of their business," but generally "only after giving appropriate public notice and an opportunity for comment"; and requiring that rules proposed by this Court be transmitted for congressional review prior to their effective date); *Barker v. Wingo*, 407 U.S. 514, 523 (1972)(noting, in declining to impose specific time periods to implement constitutional guarantee of speedy trial, that "such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts"); Sarah Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of Federal Courts*, 84 Colum. L. Rev. 1433, 1482-83 (1984) ("The announcement of a general rule in the course of the adjudication of a specific case or controversy provides less opportunity for the consideration of views from all relevant quarters, and is less likely to lead to comprehensive and integrated treatment of related problems . . . . These careful restrictions on the Court cast grave doubt on the claim that Congress implicitly granted the courts adjudicative authority to establish procedural rules free of both procedural restrictions and congressional oversight.") (footnotes omitted). *See also Miner v. Atlass*, 363 U.S. 641, 645 (1960)(rulemaking procedures were "designed

from the judicial council of the circuit, which has the power to "make all necessary and appropriate orders for the effective and expeditious administration of justice" within the circuit. 28 U.S.C. § 332(d)(1) (1988).[20]

Even if properly proposed, however, a set of deadlines such as petitioners suggest would be imprudent for several reasons. The excessive case loads now carried by the federal courts make it more critical than ever that judges be allowed wide latitude in controlling their own calendars.[21] In addition, petitioner's

---

to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords"); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 15 (1941) (Congress understood the value of reserving an opportunity to veto proposed rules before their effective date).

[20] As noted by Justice Harlan in his concurring opinion in *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 98 (1970), the "Judicial Council . . . was designed as an actual participant in the management of the judicial work of the circuit." Thus, it is empowered to hold hearings, take sworn testimony, and issue subpoenas and subpoenas duces tecum related to the administration of justice within the circuit. 28 U.S.C. § 332(d)(1). All judicial officers are bound by statute to obey the council's orders, or risk institution of contempt proceedings. 28 U.S.C. § 332(d)(2). The judicial council thus has the power to make the sort of factual inquiry required to determine the desirability of imposing a schedule for adjudication of habeas petitions in capital cases, and to compel compliance with such a schedule if one be properly put in place.

[21] In 1992, criminal cases represented almost one fourth of respondent's new filings. *See* 1992 Rep. at 126. Those cases, of course, required prompt adjudication in accordance with the provisions of the Speedy Trial Act. In the same time period, prisoner petitions constituted almost one third of all new filings. *Id.* Respondent in 1992 experienced the second highest number of new prisoner petition filings of any district in the nation; the only district with higher numbers was the Middle District of Florida, which has three more judgeships than respondent. *Id.* With

proposal fails to take into account the fact-intensive nature of habeas review, and the wide variety in size of records and seriousness of the issues raised.

As a result, any attempt to confine capital habeas review inflexibly to particular narrow time limits would have two unfortunate probable consequences. One would be the disruption of the court's handling of other urgent business, including pending criminal matters involving incarcerated defendants whose guilt has yet to be determined, temporary restraining orders and injunctions, and issues of public concern demanding a prompt resolution.[22] The second might well be the failure to give full and appropriate consideration to federal constitutional issues raised in more difficult habeas cases.

The allowance of exceptions to the time limits upon a showing of unusual circumstances would not make the proposal viable. Such an approach would consume additional judicial resources in determining the appropriateness of time limits, and if made reviewable, would make the district court judge a habitual litigant. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Judges would face the choice of meeting the presumptive

---

over 100 inmates presently on Arizona's death row, the burden placed on respondent by capital habeas petitions is unlikely to decrease any time soon.

[22] For example, in *Arizonians for Fair Representation v. Symington*, 828 F. Supp. 684 (D. Ariz. 1992), because of a legislative impasse in redistricting Arizona's congressional districts, respondent was forced to expend significant resources in a compressed time period to formulate a redistricting plan. In less than three months, respondent, sitting as a three judge court, heard and read the statements of numerous expert and lay witnesses, considered and ruled on a barrage of pre-trial motions on procedural and evidentiary issues, held trial, considered and ruled on a variety of post trial motions, and issued a written opinion and order adopting a redistricting plan. This case, the decision in which was summarily affirmed by this Court, 113 S. Ct. 1573 (1993), occupied substantial time which might have been devoted to the three matters which are the focus of the State's petition.

deadline or justifying their failure to do so in collateral litigation. *See Ortega Rodriguez v. United States*, 113 S.Ct. 1199, 1206 (1993) (exercise of supervisory authority would not serve the interests of efficient judicial operations, where it would result in a "flurry of extraneous matters . . . divert[ing] the court's attention from the merits of the case").

Petitioners' proposal for uniform mandatory time limits is also unnecessary, and completely ignores the substantial steps that have already been taken by respondent to expedite the handling of death penalty cases. First, the court has assigned a judge to serve as the death penalty coordinator for all capital habeas corpus petitions. When petitions are filed, the coordinator appoints counsel as soon as possible, and issues an order that sets a briefing schedule designed to prevent numerous delaying amendments.[23] That order also requires the State to file an answer as well as any additional responses, such as summary judgment motions, by a date certain after the amended petition is filed.

Second, the court has recently been engaged in a dialogue with Arizona state court judges to establish procedures for more efficiently resolving post-conviction proceedings in capital cases. *See* Appendix B, Letter from the Hon. Stephen M. McNamee to the Hon. Robert J. Corcoran and the Hon. Ronald S. Reinstein, Sept. 22, 1993. Among the proposals being discussed are establishing a central repository for all records and other pertinent material in capital cases, modification of case management, and amendment of Rule 32 of the Arizona Rules of Criminal Procedure (governing preclusion), the application of which often

---

[23] Under respondent's order, habeas corpus petitioners are allowed time to research and investigate their claims before filing an amended petition. However, when the amended petition is filed, the order states that the petitioner will be presumed to have deliberately waived his right to complain of any constitutional errors or deprivations other than those set forth in his amended petition.

causes respondent considerable difficulty in resolving State summary judgment motions alleging procedural default.[24]

Thus, in a fundamental sense, petitioners' real complaint concerns the existence of the federal habeas remedy in the first place, rather than any overall abuse of the system resulting from undue delay. The unavoidable consequences of Congress's decision to provide such review -- and of the holdings of this Court insuring that the writ is preserved as a meaningful remedy -- are that federal habeas proceedings will delay the "finality" of state death sentences, thus occasioning additional costs to the State and compromising to varying degree the "orderly" and effective enforcement of state death penalty laws, the public's confidence in the authoritativeness of those laws, the deterrent effect of death sentences, and the "comity" between state and federal judges. As stated in *McCleskey v. Zant*, 111 S.Ct. 1454, 1469 (1991), the "federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner in a habeas petition." That remedy can be effective only where the federal court is allowed the time and the discretion to provide the review that is appropriate in the individual case. *Cf. Barker v. Wingo*, 407 U.S. 514 (1972) ("We cannot definitively say how long is too long in a system where justice is supposed to be swift but deliberate"; accordingly, constitutional right to speedy trial must be gauged on an "ad hoc" basis).

---

[24] In addition, in July 1991, the Ninth Circuit Judicial Council's Death Penalty Task Force, after significant work by judges and practitioners in the circuit, published a "Capital Punishment Handbook" to assist judges and law clerks in dealing with capital habeas petitions.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

DONALD B. AYER
Counsel of Record
SARAH L. WANNER
STEPHEN J. JORDEN

JONES, DAY, REAVIS & POGUE
1450 G St., N.W.
Washington, D.C. 20005-2088
(202) 879-4689

Counsel for Respondent

December 13, 1993

APPENDICES

APPENDIX A

PROCEDURAL HISTORY OF CORRELL V. LEWIS, VILLAFUERTE V. LEWIS AND ARNETT V. LEWIS*

I. CORRELL v. LEWIS

DATE	DESCRIPTION OF EVENT
9/15/87	-- Correll files a preliminary petition for writ of habeas corpus, an application for stay of execution and a motion for appointment of counsel.
9/18/87	-- The district court issues an order staying Correll's execution.
10/2/87	-- The court appoints two attorneys to represent Correll **and orders the State to file a response within 40 days from the date of service of the amended petition.**
1/7/88	-- The court grants Correll's request for leave to file an amended petition **and orders that the State file a response no later than 30 days after filing the amended petition.** (Due to a clerical error at the court, the State did not receive copies of the October 2, 1987 or January 7, 1988 orders.)
2/24/88	-- Correll files the amended petition for writ of habeas corpus **and serves a copy on the State.**
1/17/89	**-- The court orders the parties to file written status reports regarding measures necessary to bring the case to issue.**
2/3/89	**-- Correll files a written status report and an application for the entry of default.**

---

* Information set forth in bold face was not referenced in the State's petition for certiorari.

DATE	DESCRIPTION OF EVENT
2/8/89	**– Default is entered by the clerk of the district court.**
2/14/89	**– The State files a motion to set aside the entry of default.**
2/27/89	**– The court issues an order setting aside the entry of default and orders the State to file a response to the amended petition.**
4/10/89	-- The State files a motion to dismiss the amended petition on the ground that Correll did not exhaust remedies available in state court.
4/27/89	**– Correll files his response to the State's motion to dismiss.**
5/8/89	**– The State files its reply to Correll's response.**
6/5/89	-- The court denies the State's motion to dismiss and orders the State to file a response to the petition.
6/14/89	-- **The State moves the court** to stay further proceedings in light of *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (holding application of sentencing provision of Arizona's death penalty statute unconstitutional).
7/21/89	-- The court grants the State's motion to stay the proceedings related to Correll's sentencing claims, but orders the proceedings relating to remainder of the claims to continue. **The court orders the State to file a response by August 20, 1989.**
9/7/89	-- The State files two separate motions for summary judgment or alternatively for dismissal.

DATE	DESCRIPTION OF EVENT
9/28/89	**– Correll files a motion to strike the State's partial summary judgment motions and for an entry of default against the State for failure to file a Rule 5 answer to the petition.**
10/3/89	**– The State files a response to Correll's motion to strike and for entry of default.**
10/30/89	**– The court denies Correll's motions to strike and for default.**
11/15/89	-- Correll files a response to the State's summary judgment motions.
12/4/89	-- The State files its reply.
2/10/90	-- Correll files a second request to amend petition with two additional claims.
2/23/90	-- The State files an opposition to Correll's request to amend.
3/7/90	-- Correll files his reply.
3/14/90	-- The court grants Correll's request to amend the petition.
4/2/90	-- The State files a separate summary judgment motion on the newly added claims.
5/7/90	**– Correll files a response to the State's motion for summary judgment.**
7/13/90	**– The case is reassigned to newly appointed District Court Judge Stephen McNamee.**
7/19/90	**– The Court grants Correll's motion for appointment of an investigator.**

DATE — DESCRIPTION OF EVENT

9/6/91 — The State files a brief request for a ruling in the case, citing *Walton v. Arizona*, 497 U.S. 639 (1990) and *Lewis v. Jeffers*, 497 U.S. 764 (1990).

9/27/91 -- The court orders a status conference for October 4, 1991.

10/4/91 -- The court holds a status conference.

1. The State informs the court of the procedural history of the case and notes that the State had filed a response to the guilt phase claims, but had not yet responded to sentencing phase issues presented in Correll's petition.

2. The State informs the court that it is appropriate to allow Correll to amend his petition.

3. The State agrees that the most efficient approach would be to vacate the other previously filed motions for summary judgment and to proceed with one motion.

4. The court vacates the previously issued stay of proceedings regarding Correll's sentencing claims and issues a briefing schedule.

5. The court sets a status conference for May 11, 1992.

12/6/91 -- Correll files the third amended petition for writ of habeas corpus, **which raises approximately 53 separate claims.**

2/14/92 -- The State files a new motion for summary judgment.

DATE	DESCRIPTION OF EVENT
3/6/92	**-- The court grants Correll's motion for an extension of time to respond to the motion for summary judgment.**
5/15/92	-- Correll files his response to the State's summary judgment motion and moves to expand the record.
5/29/92	-- The State files its reply in support of its summary judgment motion, **its response to Correll's motion to expand the record, and a motion for an extension of time to respond to any future arguments by Correll regarding cause and prejudice. (The State's motion for an extension of time also requested additional time to address the merits of any defaulted claims for which Correll could demonstrate cause and prejudice).**
6/19/92	-- The court hears oral argument on the motion for summary judgment; the court states that it will enter a formal written order.
3/23/93	-- The State files a request for a ruling on its summary judgment motion.
7/1/93	-- The State files a petition for Writ of Mandamus with the Court of Appeals for the Ninth Circuit.
7/22/93	**-- The court files a 39-page order that:**
	1. resolves various technical defects with the presentation of claims in the amended petition and related pleadings;
	2. denies Correll's motion to expand the record;
	3. finds 26 of Correll's claims procedurally barred;

DATE DESCRIPTION OF EVENT

4. allows Correll **30 days** to submit any arguments demonstrating cause and prejudice to overcome the findings of default;

5. **grants the State's May 29, 1992 motion for ~~additional time~~ to respond to any allegations of cause and prejudice submitted by Correll and to address the merits of certain claims;**

6. deems the State's motion for summary judgment to be no longer under advisement because of the outstanding issues of cause and prejudice.

8/31/93 -- The State files objections to respondent's order and contends that it was error to allow Correll additional time to demonstrate cause and prejudice.

9/13/93 -- Correll files his motion for reconsideration and showing of cause and prejudice.

10/18/93 – The court grants the State's motion for leave to accept the State's late filing of responses to Correll's motions for reconsideration and showing of cause and prejudice. The State's failure to submit additional briefing was excused by the court based on an error in calendaring deadlines. The court again notes that the State's summary judgment motion is no longer ripe given that the motion does not address Correll's claims of cause and prejudice.

11/1/93 – The State files its response to Correll's motion for reconsideration and showing of cause and prejudice.

II. VILLAFUERTE v. LEWIS

DATE	DESCRIPTION
5/9/91	-- Villafuerte files a preliminary petition for writ of habeas corpus, an application for stay of execution, and a motion for appointment of counsel.
5/14/91	-- The court issues a stay of execution and appoints counsel.
6/26/91	**– The court grants Villafuerte's motion for extension of time to file an amended petition.**
7/19/91	-- Villafuerte files an amended petition.
8/26/91	-- The State files a motion for summary judgment.
10/11/91	**– Villafuerte files a motion to expand the record and a request for an evidentiary hearing.**
10/17/91	-- Villafuerte files a response to the State's summary judgment motion.
10/29/91	**– The court finds Villafuerte's request to expand the record moot.**
11/7/91	**– The State files a response to Villafuerte's motion for an evidentiary hearing and a reply brief in support of its summary judgment motion.**
11/14/91	**– The court schedules oral argument on the State's summary judgment motion for January 13, 1992.**
11/27/91	**– The State files transcripts from state court proceedings.**
12/10/91	**– To force compliance with local rules, the court orders Villafuerte to file a statement of facts in support of his previously submitted response to the State's summary judgment motion. The**

DATE	DESCRIPTION OF EVENT
	court allows the State to amend its motion and schedules oral argument for March 16, 1992.
12/20/91	**-- Villafuerte files a statement of facts.**
3/16/92	-- The court hears oral argument on the State's motion for summary judgment and takes it under advisement.
7/17/92	**-- The State supplements the record to include the Arizona Supreme Court's order denying review of Villafuerte's post-conviction relief petition.**
8/3/92	**-- The court issues an order finding six claims procedurally barred and orders additional briefing by both parties on issues of cause and prejudice. The court dismisses without prejudice Villafuerte's motion for an evidentiary hearing.**
8/21/92	**-- Villafuerte moves for reconsideration of denial of his request for an evidentiary hearing (in lieu of a separate brief on issues of cause and prejudice).**
9/4/92	**-- The State files its opposition to Villafuerte's motions.**
10/15/92	**-- The State supplements its opposition.**
7/1/93	-- The State files a petition for Writ of Mandamus with the Court of Appeals for the Ninth Circuit.
7/9/93	-- The court denies reconsideration of its findings and dismissal of Correll's request for an evidentiary hearing, and grants summary judgment on the six claims found barred.

DATE	DESCRIPTION OF EVENT
9/29/93	-- The court issues an 81-page order denying Villafuerte all relief, granting the State's motion for summary judgment and vacating the previously issued stay of execution.

III. ARNETT v. LEWIS

DATE	DESCRIPTION
11/3/83	-- Arnett files a petition for writ of habeas corpus and stay of execution.
1/3/84	**– The State answers the petition.**
2/6/84	**– Arnett challenges the sufficiency of the State's Rule 5 answer.**
12/10/84	**– Arnett files a motion for discovery, including interrogatories and requests for production of documents and admissions.**
6/3/85	**– The court finds that some claims are not exhausted and dismisses the petition without prejudice.**
6/13/85	**– Arnett files a motion to amend or alter the judgment.**
10/4/85	**– The court grants Arnett's motion and vacates its June 3, 1985 order and vacates the judgment.**
11/22/85	**– After conducting an informal conference, the court grants in part Arnett's motion for discovery and *sua sponte* grants summary judgment for the State on several claims.**
4/9/86	-- Arnett files a motion for partial summary judgment.

5/12/86 -- **The State files a cross motion for partial summary judgment.**

7/86 -- Arnett files two additional motions for partial summary judgment, **a motion for an evidentiary hearing, and requests for discovery.**

7/30/86 -- **The State files a further cross motion for partial summary judgment.**

2/25/87 -- The court grants partial relief to Arnett on his summary judgment motions. The order sets aside Arnett's sentencing and allows an evidentiary hearing on the voluntariness of the confession on which his conviction was based. 665 F. Supp. 1437, 1440-1446.

-- **With respect to Arnett's sentencing phase claims, the court finds:**

1. A *Miranda* violation in connection with a psychiatric evaluation ordered by the State, the report of which was used at the sentencing hearing;

2. A *Miranda* violation resulting from actions by the probation officer who prepared the presentencing report;

3. A denial of confrontation at the sentencing;

4. A lack of competent proof of aggravation;

5. Ineffective assistance of counsel at the sentencing phase; and

6. The improper admission of an invalid California conviction.

-- **(The State did not seek summary judgment on Arnett's claim that his confession was coerced by the allegedly deplorable condition of his 1976 incarceration. *Id.* at 1446. Nor did it**

DATE	DESCRIPTION OF EVENT
	address Arnett's claim of an improper jury instruction on malice.)
3/6/87	-- The State seeks a stay of the proceedings pending conclusion of Arnett's state collateral proceedings.
3/19/87	-- Arnett files a response opposing the State's motion for a stay of the habeas proceedings.
3/30/87	-- **Over the objections of Arnett's counsel,** the court grants the State's request for a stay of all matters, including the evidentiary hearing.
7/29/88	-- The Supreme court of Arizona affirms Arnett's conviction and death sentence. *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988).
10/3/88	-- The State asks the court to lift the stay and grant a rehearing of its February 25, 1987 order, **or to allow the State to seek interlocutory appeal under 28 U.S.C. 1292(b) and issue a stay pending that appeal.**
11/1/88	-- Arnett files a response to the State's motion to grant a rehearing of the court's February 25, 1987 order and to appeal.
11/21/88	-- Arnett requests permission to amend his petition to include new issues recently decided by Arizona Supreme court.
11/28/88	-- The court vacates its previously issued stay of proceedings, **denies the State permission to pursue an interlocutory appeal and grants Arnett's motion to depose various individuals in preparation for the evidentiary hearing.** The court allows Arnett to amend his petition

DATE	DESCRIPTION OF EVENT
	with additional claims that were exhausted in State court.
8/29/89	**– The State files a motion to dismiss the petition.**
11/28/89	**– Arnett files an amended petition.**
7/12/90	**– The case is reassigned to newly appointed District Court Judge McNamee.**
8/24/90	**– The court schedules an evidentiary hearing for October 29, 1990.**
10/12/90	**– The court conducts a status conference regarding the manner in which the hearing would proceed and schedules a follow-up conference for November 26, 1990.**
11/26/90	**– The court holds a status conference and schedules a preliminary hearing for December 6, 1990.**
12/6/90	**– The court conducts a preliminary hearing: the parties discuss issues involving discovery and the presentation of evidence; Arnett files seven videotaped depositions relating to Arnett's allegedly coerced confession. The court states that it will review the depositions and orders supplemental hearing memoranda from the State in response to Arnett's memorandum on the admissibility of evidence.**
12/21/90	**– The State files its response to Arnett's memorandum regarding admissibility of evidence.**
1/25/91	**– Arnett files a reply to the State's response.**

DATE	DESCRIPTION OF EVENT
9/27/91	– The court grants Arnett's ex-parte request for additional resources including the appointment of an expert witnesses.
12/30/91	– The court schedules a status conference for January 13, 1992 regarding scheduling the evidentiary hearing.
1/13/92	– The court holds a status conference to discuss discovery and evidentiary issues, and to obtain information regarding the evidentiary hearing.

1. The court asks the parties how changes in case law would affect the court's February 25, 1987 order. In response, the State requests the opportunity to investigate any change in the case law that might affect the court's previous rulings in favor of Arnett.

2. In response to the court's questioning about claims raised in the amended petition filed on November 28, 1989, counsel for Arnett states that he is preparing a summary judgment motion on those issues. Counsel for the State states that he is not aware of the amended petition or whether the State had responded to the petition. At the request of the court, the State agrees to file a cross-motion for summary judgment on the additional claims.

3. The court asks the parties to determine whether any prior order had disposed of Arnett's claim regarding a jury instruction on malice because the court had not been able to locate any such decision.

4. The court questions the parties about how long the evidentiary hearings will take.

DATE	DESCRIPTION OF EVENT
	5. Both parties agree to allow depositions of any expert witnesses they expect to call.
4/16/92	**-- The court orders Arnett to file a statement of facts in connection with the filing of a partial summary judgment motion.**
4/23/92	-- Arnett files a further motion for partial summary judgments on the new claims in the amended petition filed on November 28, 1988.
5/13/92	-- The State files its response to Arnett's motion for partial summary judgment.
7/2/92	**-- Arnett files his reply.**
7/1/93	-- The State files a petition for Writ of Mandamus with the Court of Appeals for the Ninth Circuit.
9/3/93	**-- The court schedules a status conference for September 15, 1993.**
9/15/93	**-- The court holds a status conference: at which the admissibility of various exhibits is discussed,** and the court schedules an evidentiary hearing for November 16, 1993. **The court questions the State as to why they had not requested a summary judgment with respect to a jury instruction claim when the court's February 25, 1987 opinion pointed out that the State had not addressed the claim, and notes that case was never technically ripe for final resolution.**
9/28/93	**-- After reviewing the previously submitted videotaped depositions, the court issues an order admitting the remaining exhibits and depositions and authorizing subpoenas to conduct videotaped depositions of out-of-state**

DATE	DESCRIPTION OF EVENT
	witnesses. The court orders the State to file a motion for summary judgment on the remaining claim pertaining to the jury instructions on malice, and notes that the State's argument that the case is ripe for review is based on inaccurate assumptions rather than a thorough review of record.
10/15/93	**– The State files a motion for summary judgment on the malice instruction pursuant to the court's order.**
11/1/93	**– Arnett files his response.**
11/16-18, 11/23, 12/2/93	**– The court holds an evidentiary hearing on the issue of the allegedly coerced confession. The court sets a final briefing schedule, to be completed in January, 1994.**

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
United States Courthouse
230 North First Avenue
Phoenix, Arizona 85025

Stephen M. McNamee
United States District Judge

Telephone: 602-514-7016
FAX: 602-514-7173

September 22, 1993

Honorable Robert J. Corcoran
Supreme Court of Arizona
1501 West Washington
Phoenix, Arizona 85007-3229

Honorable Ronald S. Reinstein
Superior Court of Maricopa County
101 West Washington
Suite No. 514
Phoenix, Arizona 85003-2205

Dear Bob and Ron:

As we recently discussed, capital cases present significant judicial and administrative challenges to both state and federal courts. It is my hope that the enclosed summary of our informal discussion regarding these issues may be useful in implementing potential solutions to these problems and creating a more productive relationship between the state and federal judiciary.

Many of the problems associated with capital cases stem from the inordinate amount of time they require to achieve final resolution and from the often highly technical procedural path they travel through each judicial system.

One of our mutual concerns is to try to establish a series of procedures that will allow petitioners to exercise their rights while at the same time construct a framework for the orderly processing of capital cases. While still in the "thinking" stages, these concepts should serve as the basis for further dialogue between us.

I. CENTRALIZED CONTROL OF THE RECORD

The first suggestion is that we explore the feasibility of establishing a central depository or "library" for all records, exhibits, transcripts, and other pertinent materials in capital cases.

The depository would function through a clerk's office and would assist our courts in creating and maintaining a uniform case record. Counsel would have unlimited access to the records; however, they would be required to re-deposit the records at the conclusion of their involvement in the case. the records would then be available for subsequent counsel. As you are aware, it is not uncommon for a petitioner to have three or more counsel throughout these protracted proceedings.

Hopefully, this procedure would ensure that no portions of the record are lacking regardless of that forum the case may be in or when counsel became involved in the matter. Further, a central depository would place responsibility for the preservation oft he records on the individuals who utilized them and would eliminate the unnecessary expenditure of taxpayer dollars to reproduce the entire record repeatedly.

A central depository may also reduce the time new attorneys require the "get up to speed" on a case because they would no longer be required to expend valuable time assembling the record from prior counsel if it is still available. Moreover, centralization of the record would allow the courts to utilize a uniform numbering system for all documents and exhibits. In this manner, confusion would be eliminated and references to the record in state or federal orders would be identical. This system would

provide for a more efficient, accurate, and timely review of a petitioner's claims.

II. MODIFICATION OF CASE MANAGEMENT & AMENDMENT OF RULE 32

A. *Case Management*:

One of the problems that we hope to avoid by adopting uniform case management procedures is to reduce the "ping-pong" effect between the state and federal forums in capital cases. Our obvious goal is the effective review of claims within an orderly framework.

The "problem areas" associated with the management of capital cases can be grouped into three basic categories: The presentation of claims; judicial rulings or orders; and the procedural posture or forum in which the case should proceed.

1. Petitioners often present their claims in a confusing manner. Further, various methods i.e., numerical, alphabetical, or merely paragraph designations are used to separate allegations. The confusion is compounded through successive petitions which adopt, change, or modify overlapping claims. One suggested method of identifying claims in all state and federal collateral proceedings would be to adopt a uniform identification for claims. Further, I would suggest that all claims be grouped in two major categories: Guilt Phase Claims & Sentencing Phase Claims.

If a uniform numbering of claims were adopted, a petitioner's allegations of error would be "permanently" identifiable by one numerical designation throughout all state and federal proceedings. As the state post-conviction court would control these designations, it would also be effective to require that all additional Rule 32 petitions number claims as if continuing with the initial proceeding. For example, if the first petition raised claims 1-10 (guilt phase) and 1-5 (sentencing), a second petition should be numbered claims 11-16 (guilt) and 6-9 (sentencing).

If implemented this procedure would greatly reduce the confusion associated with successive petitions in both state and federal courts. It would allow for a more simplified determination of what were new/successive/or abusive claims. It would be especially helpful when our courts are reviewing petitions in light of Rule 32.2 (procedural default) or *McCleskey v. Zant*, 111 S.Ct. 1454 (1991)(abuse of the writ). Also, it would help to make petitions more understandable in the event of a change or modification of case law.

2. Petitioners often attempt to proceed through the state system in an almost pro forma fashion merely for the purpose of avoiding a procedural default. The petitions do not comport to state procedural rules for meaningful development of a claim. The petitioners' purpose has been to reach the federal courts as quickly as possible because they are more likely to obtain greater resources and counsel will receive greater compensation all pursuant to federal statutes. *See* 21 U.S.C. § 848(q)(4)(B), *et seq*.

Upon reaching the federal courts, petitioners make broad requests for discovery and additional resources, often alleging that arbitrary deprivation of such resources in the state system prevented them form adequately developing or presenting their claims. Petitioners then claim arbitrary deprivation because state court orders often state no more than that the request is "denied." If orders were to specify the basis for denying additional resources, discovery, or evidentiary hearings, state appellate courts and federal courts could more effectively and efficiently review these requests to determine whether a petitioner is entitled to such services or procedures. A finding that a petitioner failed to articulate the basis for his request or that he failed to demonstrate good cause would be of significant value to reviewing courts.

These modifications would require petitioners to more carefully adhere to post-conviction rules in state court and would help to eliminate the apparent unfairness of the federal courts

reviewing claims presented in a substantially different light than when presented to the state courts. I believe this procedure is particularly appropriate in light of the Supreme Court's recent rulings in *McCleskey v. Zant*, 111 S.Ct. 1454 (1991) and *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992).

3. Another problem confronting our courts is determining in which forum a claim should be litigated. Obviously, the proble m involves primarily "new" claims raised in successive petitions.

If state remedies remain available, then federal law requires that the state courts first determine the merits of the claim. If no remedies are available, then a federal court may apply state procedural rules to find the claim procedurally barred. In some cases, however, this determination may be unclear resulting in the awkward "stay/abeyance" procedure discussed below.

As noted above, the uniform method of numbering claims would greatly reduce the confusion with respect to this issue.

B. *Rule 32*:

As previously noted, petitioners often place the state and federal courts in a virtual "tug of war." This conflict can occur when a petitioner is attempting to litigate matters in both forums simultaneously. A brief explanation of the procedural posture in these situations may be helpful to explain the need for the suggested amendment to Rule 32.

1. Procedural Posture

Once the amended federal petition is filed, inevitable new and previously unpresented claims are raised. At this point, the federal court has three choices: dismiss the petition to allow for state exhaustion; find the claims barred and resolve the petition; or hold the petition in abeyance pending exhaustion of the claims in state court.

The only time the abeyance procedure is utilized is when it is unclear whether state remedies remain available for the presentation of a claim under the exceptions to Rule 32.2. The federal court may choose to hold a petition in abeyance as opposed to dismissing the petition to ensure that a warrant of execution is not issued prior to an adjudication of petitioner's claims or a determination is made as to their procedural posture.

2. Problem

The abeyance procedure is disruptive and disfavored. A case remains in federal court for purposes of continuing a stay of execution, yet all activity is occurring in state court. This procedure tends to allow cases to languish in both forums for an inordinate amount of time. The only reason it is utilized is because a procedural anomaly exists in Rule 32.

Defendants commence a successive Rule 32 proceeding by filing a petition in the Superior Court. However, any stay of execution on a successive Rule 32 petition must be obtained from the Arizona Supreme Court pursuant to Rule 32.4 (f). Rule 32.4 (f) requires defendants to demonstrate why their new claims would not be precluded from review under Rule 32.2

The problem facing this Court is what to do when the Arizona Supreme Court denies a stay of execution, but the petition itself remains pending in the Superior Court. (Another twist to this procedure occurs when a petitioner files a successive petition in the Superior Court but fails to file for a stay of execution in the Supreme Court.)

Arguably, a finding of preclusion has already been rendered by the denial of a stay. However, nothing within the Arizona Rules of Criminal Procedure prevents the Superior Court judge from adjudicating the petition and rendering a decision on the merits. Thus, in an emergency, petitioners claim state procedures are ineffective and request the federal court to stay their execution pending completion of state proceedings.

3. Proposed Amendment

One idea we discussed is a possible amendment to Rule 32.4 (f) as follows:

> [N]o stay of execution shall be granted upon the filing of a second or subsequent petition except upon separate application for a stay to the Supreme Court, setting forth with particularity those issue not precluded under Rule 32.2. <u>If it is determined by the Supreme Court that defendant is not entitled to a stay because any new claims would be precluded or because the claims have been previously presented and denied on the merits, the Superior Court judge shall immediately adopt the findings of the Supreme Court, dismiss the petition, and terminate the successive Rule 32 proceeding.</u>

[Proposed amendment consists of underlined language]

4. Benefits

The proposed amendment would significantly reduce confusion between the state and federal systems, ensure adjudication of claims presented in a procedurally appropriate manner, and reduce the state court's docket as well as the time for processing successive state petitions.

When confronted with an issue of exhaustion, the federal court could immediately dismiss the petition and vacate the stay of execution. Petitioners could then commence their successive Rule 32 proceeding. If a new warrant is issued, the petitioner could apply for a stay to the Supreme Court, and, if it is denied, petitioner's state proceedings would terminate and petitioner would file a new action in federal court presenting only exhausted claims.

As we discussed, the purpose of our discussion is to develop and modify some procedures to bring a more orderly and effective review of claims of error to the courts. In many instances, the

petitioner has significant burdens of proof under Rule 32. Under *McCleskey* and *Tamayo-Reyes*, the perfection of the record at the initial appeal and post-conviction relief petition is essential. Obviously, these ideas must be "kicked around" by a wider circle of interested parties. However, it is a beginning.

I look forward to hearing your views and concerns.

Very truly yours,

Stephen M. McNamee
United States District Judge

SMM\ctk

Supreme Court, U.S.
FILED
OCT 20 1993
OFFICE OF THE CLERK

No. 93-406

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ARIZONA Attorney General,

PETITIONERS,

-vs-

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

RESPONDENT,

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, JIMMY ALAN ARNETT,

REAL PARTIES IN INTEREST.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
Criminal Appeals Section
(Counsel of Record)
1275 West Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686

Attorneys for PETITIONERS

QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit abuse its discretion by refusing to issue a writ of mandamus to supervise the orderly administration of the Arizona District Court, when the evidence clearly demonstrated that the District Court had shown a constant refusal to rule promptly on pending capital habeas corpus cases?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS WHY THE WRIT SHOULD ISSUE	2
CONCLUSION	5

TABLE OF AUTHORITIES

CASE	PAGE
McCleskey v. Zant, ___ U.S. ___, 111 S. Ct. 1454 (1991)	3
Moore v. Ogilvie, 394 U.S. 814 (1969)	2, 3
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)	4
Renne v. Geary, ___ U.S. ___, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991)	2
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911)	2, 4
Will v. United States, 389 U.S. 90 (1967)	3

STATEMENT OF THE CASE

After the filing of the State's petition for writ of certiorari, the following action has taken place in the District Court.

Correll v. Lewis.

Correll filed the additional memoranda ordered by the District Court. (See Petition for Certiorari at 6 n.3.) The State's final memorandum is due November 1, 1993. The State's Motion for Summary Judgment is still pending.

Villafuerte v. Lewis.

On September 28, 1993, the District Court granted the State's summary judgment motion and denied Villafuerte relief on any basis. On October 21, 1993, Villafuerte filed an appeal to the Ninth Circuit Court of Appeals.

Arnett v. Lewis.

As noted by Arnett in his Brief in Opposition, the District Court has set the evidentiary hearing for November 16, 1993.

REASONS WHY THE WRIT SHOULD ISSUE

THE QUESTION PRESENTED IS NOT MOOT BECAUSE THE DISTRICT COURT HAS NOT RULED ON THE STATE'S SUMMARY JUDGMENT MOTION IN CORRELL v. LEWIS, AND EVEN IF IT DOES, THE ISSUE IS "CAPABLE OF REPETITION, YET EVADING REVIEW."

In the Brief in Opposition, real party in interest Arnett, claims the issue is moot in his case because the District Court has set an evidentiary hearing. The same claim could now be raised in *Villafuerte* because the District Court has ruled on the State's motion for summary judgment. The District Court has not ruled on the State's Summary Judgment motion in *Correll*. For the reasons stated below, the State believes that, even if the District Court should rule on the Summary Judgment motion in *Correll*, the issue is not moot.

This Court has long recognized that this Court may still rule on an issue if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 515 (1911); *Renne v. Geary,* ___ U.S. ___, 111 S. Ct. 2331, 115 L. Ed. 2d 288 (1991); *Moore v. Ogilvie,* 394 U.S. 814, 816 (1969). While the "capable-of-repetition, yet-evading-review" exception is to be exercised in limited circumstances, this Court has indicated that it should be used where "[t]he need for . . . resolution . . . reflects a continuing controversy in the

federal-state area." *Moore v. Ogilvie*, 394 U.S. at 816. (*See* Amicus Brief of California, et al., at 12 n.11.)

As noted in the petition, Arizona is suffering from a severe diminution of its sovereignty because of the District Court's practice of taking years to rule on capital habeas corpus petitions. In an attempt to rectify the situation, Arizona selected a representative sample of the then pending cases, and filed a petition for writ of mandamus with the Ninth Circuit. The overall abuse of the system by the District Court is clearly more important than the individual facts of any one of the cases presented. As such, the cases were a vehicle the State attempted to use to force the Court of Appeals to exercise its supervisorial authority, and establish guidelines to enforce this Court's mandate in *Blodgett*.

The fact that the District Court has ruled on one case, set an evidentiary hearing on another, and ordered additional briefing on the third, does not resolve the issue of whether the District Court is failing to resolve capital cases in a timely fashion, and whether the Ninth Circuit, by not exercising its mandamus authority, abdicated its supervisory function. *Will v. United States*, 389 U.S. 90, 107 (1967). Arizona is suffering, and will continue to suffer, the harm recognized by this Court in *McCleskey v. Zant*, ___ U.S. ___, 111 S. Ct. 1454, 1469 (1991), because the excessive delay is prohibiting the State from enforcing a presumptively valid

conviction and sentence. The harm is not only occurring in Arizona, but across the nation. (Amicus Brief of California, et al., at 7–12.; Amicus Brief of Missouri at 3–10.) Clearly this is a harm "capable of repetition." *Southern Pacific Terminal v. Interstate Commerce Commission*, 219 U.S. at 515.

Likewise, the mandamus petition means little if the lower court can allow a case to languish for 10 years, and then avoid review by taking some action after the State files a petition for certiorari with this Court. *Cf. Nebraska Press Association v. Stuart*, 427 U.S. 539, 546 (1976) ("The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired.") If such were the state of the law, the lower courts could forever thwart this Court from reviewing their delay.

CONCLUSION

For all of the above-stated reasons, the State of Arizona respectfully requests that the Court grant its certiorari petition.

Respectfully submitted,
GRANT WOODS
Attorney General

PAUL J. McMURDIE
Chief Counsel
(Counsel of Record)

Attorneys for PETITIONERS